Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1927

No. 337

THE WILLIAMSPORT WIRE ROPE COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 29, 1927

CERTIORARI GRANTED NOVEMBER 28, 1927

(32,789)

(32,789)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1927

No.

THE WILLIAMSPORT WIRE ROPE COMPANY, a Corporation,
Petitioner,

v.

THE UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petition

The petitioner, The Williamsport Wire Rope Company, a corporation, by its Counsel, prays that a writ of certiorari issue in this case to review the judgment of the Court of Claims in favor of the United States, entered in the above entitled case on May 2, 1927.

Statement

The question presented here is whether the Court of Claims, and, consequently, the District Courts of the United States, have jurisdiction to hear and determine cases arising under Sections 327 and 328 of the Revenue Act of 1918, [fol. 2] which require the Commissioner, where he is unable to determine a taxpayer's statutory invested capital and or where abnormal conditions affecting capital or income are found to exist which make the ordinary formula for computing war profits and excess profits taxes work exceptional hardship and produce inequitable results to the taxpayer, to compute these taxes at the average rate of taxes of representative corporations engaged in a like or similar trade or business.

The provisions of Sections 327 and 328 are set forth in the supporting brief.

The question arises in this case in this way:

Petitioner, in due season, filed its return of income and profits taxes for the calendar year 1918, and computed its

tax under Section 301 of the Revenue Act of 1918 to be $306,381.77. Such portion thereof as represented war profits tax was in excess of 50 per cent of its indicated taxable income. In such cases the Revenue Act of 1918, Section 328 (b) provides that the taxpayer may pay 50 per cent as war profits tax and make application for the computation of its taxes under Sections 327 and 328. Petitioner, however, paid the entire amount of the tax found to be due under Section 301.

In 1920 a Revenue Agent made an examination of petitioner's books and made a number of proposed adjustments or corrections, the principal one being an adjustment of petitioner's inventories of raw material, work in process and finished merchandise back to 1914. For the year 1918 (fol. 31 petitioner's inventory was increased at the beginning of the year by $229,220.52, and at the end of the year by $317,178.54. Upon this adjustment or alleged correction in inventory, which was approved by the Commissioner, an additional tax of $89,084.81 was assessed against and collected from petitioner.

Petitioner, on June 14, 1924, filed a claim for a refund of $180,000.00, stating therein that this amount represented the amount by which its tax computed under Section 301 of the Revenue Act of 1918 exceeded its tax as computed under Sections 327 and 328 of that Act, and insisted that its tax should be computed under these Sections. The Commissioner took no action upon this claim, and after six months elapsed petitioner filed suit for the recovery of these taxes.

The petitioner alleged the assessment and collection from it of income and profits taxes computed under Section 301 of the Revenue Act of 1918 is illegal, and that as a matter of fact as well as law it has a legal right to have its taxes for the year 1918 computed under Sections 327 and 328 of the Revenue Act of 1918, because (1) it is impossible for the Commissioner of Internal Revenue or anyone else to determine the correct amount of petitioner's invested capital as defined in Section 326 of the Revenue Act of 1918, and (2) abnormal conditions exist affecting both the capital and income of the petitioner which work upon it an exceptional hardship, evidenced by gross disproportion between the tax paid by it, under Section 301 of the Revenue

Act of 1918, and its tax computed under Sections 327 and 328 of the Revenue Act of 1918, by reference to representa-
(fol. 4) tive corporations engaged in the same trade or business.

In support of the allegations that it is impossible to correctly determine its invested capital the petitioner cited these facts:

1. Petitioner pursued a policy of charging large sums expended for plant additions and improvements to expense and not to capital.

2. Prior to the year 1918 petitioner developed valuable secret processes essential to the profitable operation of its business, and no part of the cost thereof has ever been capitalized.

These facts were ignored by the Commissioner of Internal Revenue when he made his adjustment of petitioner's invested capital.

In support of its allegations that abnormal conditions exist affecting its capital and income which work upon it an exceptional hardship, petitioner cited these facts:

1. Since its organization, in May, 1887, it has never undergone a reorganization or merger, but has since that time conducted an increasing and important business, and has thereby acquired a good will asset not recorded on its books, the value thereof, namely, $1,037,743.00, being ignored by the Commissioner of Internal Revenue in his computation of its invested capital.

2. During the year 1918 petitioner used in its business large sums of borrowed money. On January 1, 1918 its percentage of borrowed money to capital stock ($100,000.00)
(fol. 5) was 114.8 per cent, and on December 31, 1918, was 122.3 per cent.

3. The salaries paid its officers were abnormally low, being but 3.76 per cent of its taxable income for 1918.

4. The tax imposed upon petitioner for 1918 is 67.87 per cent of its taxable income, whereas as to representative corporations engaged in the same trade or business the tax imposed is not in excess of 55 per cent of their taxable income.

3. This is a test case. There are now pending in the Court of Claims and in the District Courts of the United States a very large number of cases involving the same question as is here presented. Petitioner's counsel have other identically similar cases and know of a number of others which will be controlled either in whole or in part by the decision in this case. Since the decision in this case [fol. 7] was rendered petitioner's counsel have received constant inquiries from other taxpayers whose claims are directly affected.

4. The decision of the Court of Claims is directly contrary to the decisions of the United States Board of Tax Appeals, the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia, and to the decisions heretofore rendered by the Court of Claims in following those decisions.

5. The decision of the Court of Claims is contrary, in principle, to other decisions of that Court.

6. This case was brought as a test case at a time when there existed a right of appeal from the Court of Claims to this Court. Had the decision been rendered that this right was likely to be abolished, as it has been, the test case would probably have been brought in a District Court so as to preserve the right to a trial by jury upon the facts.

7. The decision of the Court of Claims is contrary to the law and decisions and will lead to the assessment and collection of taxes illegally and unconstitutionally levied.

8. The decision of the Court of Claims is predicated upon facts contrary to those alleged in the amended petition and which, if the contrary were true, would be taxes at once.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Claims should be granted.

James Walter, 1420 Park Building, Pittsburgh, Pa.
Clarence A. Miller, 1420 F Street, N. W., Washington, D. C., Counsel for Petitioner.

[fol. 1] In the Court of Claims of the United States

No. [illegible]

The Williamsport Wire Rope Company

vs.

The United States

I. History of Proceedings

On December 19, 1924, the plaintiff filed its original petition.

On January 27, 1925, a general traverse was entered under Rule 24.

Subsequently, to wit, on January 17, 1927, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. Amended Petition. Filed January 17, 1927

To the Honorable the Chief Justice and the Judges of the Court of Claims of the United States:

The claimant, The Williamsport Wire Rope Company, a Pennsylvania corporation, (hereinafter referred to as your petitioner), represents and alleges as follows:

[fol. 2] I

The Williamsport Wire Rope Company is a corporation under the laws of the State of Pennsylvania, incorporated on the 20 day of May, 1899, as The Morrison Wire Rope Company, changing its name on, to wit, the 7th day of May, 1900, to The Williamsport Wire Rope Company, and has its office and principal place of business in the City of Williamsport, County of Lycoming, State of Pennsylvania, and has since the date of its incorporation been engaged in the manufacturing of wire or steel, or both, and parts thereof, wire rope, flattened strand, wire brass, copper or any other metal. It is now and at all times hereinafter mentioned has been engaged principally in the business of manufacturing wire rope and selling its products throughout the United States and elsewhere.

II

In conformity with the Revenue Act of 1918 (40 Stat. 1057), your petitioner, during the year 1919, on, to wit, the 15th day of June, 1919, and within the time prescribed by law, made and filed with the Collector of Internal Revenue of the United States for the Twelfth District of Pennsylvania, at Scranton, Pennsylvania, in which district the city of Williamsport is located, a return of all income received by it during the calendar year 1918. The said return of income was made on Form 1120 of the Office of the Commissioner of Internal Revenue, and was in all respects complete and regular, and in accordance with the laws and regulations relating thereto, and showed thereon a total tax liability of $306,381.77.

III

The said return was not false or fraudulent.

IV

The tax shown to be due on said return was, upon notice and demand from the said Collector of Internal Revenue claiming to act in pursuance of the Revenue Act of 1918, paid to him as follows:

March 12, 1919	$68,750 00
June 14, 1919	84,440 89
September 15, 1919	76,595 44
December 15, 1919	76,595 44
	$306,381 77

V

As a result of an examination of its books by Internal Revenue Agents A. R. Viner, C. L. Bush, and W. H. Gross, your petitioner on, to wit, the 13th day of April, 1920, was informed and advised by the Commissioner of Internal Revenue that, because of an amendment or revised computation of its income, its tax liability for the year 1918 was $89,994.86 in addition to the tax of $306,381.77 already paid, whereupon your petitioner duly filed with the Com-

missioner of Internal Revenue in protest of his action in proposing to assess said additional tax of $89,084.85.

VI

Notwithstanding the protest of your petitioner, the Com- [fol. 4] missioner of Internal Revenue did illegally on, to wit, the 30th day of June, 1920, make and levy against your petitioner an additional assessment of taxes based upon said amended or revised computation of income in the sum of $89,084.85, and through the Collector of Internal Revenue for the Twelfth District of Pennsylvania, made demand upon your petitioner for the payment of said taxes so assessed, with threats to impose penalties, levy distraint, and seize your petitioner's property if said tax be not paid.

VII

Your petitioner on, to wit, the 12th day of July, 1920, paid to the said Collector of Internal Revenue for the Twelfth District of Pennsylvania the said amount of $89,084.85, additional taxes assessed against it.

VIII

On, to wit, the 30th day of April, 1924, the Commissioner of Internal Revenue, informed and advised your petitioner that its tax liability for the year 1918 had again been recomputed and found to be $38,987.53, resulting in an overpayment of its taxes by your petitioner in the sum of $12,397.09, which said sum was refunded to your petitioner on, to wit, the 19th day of June, 1924.

IX

The computation of the taxes of your petitioner was made by Commissioner of Internal Revenue under and by virtue [fol. 5] of the provisions of Section 301 of the Revenue Act of 1918, a true copy of said computation being attached hereto as "Exhibit A," made a part of this petition, and prayed to be read and taken as a part hereof.

X

Your petitioner did not derive or receive any income from Government contracts on a cost plus basis during the year 1918.

XI

The Commissioner of Internal Revenue, as shown by "Exhibit A," illegally computed the Excess Profits Tax and War Profits Tax of your petitioner for the year 1918, under the provisions of Section 301 of the Revenue Act of 1918, because as a matter of fact, and as a matter of law, the Excess Profits Tax and War Profits Tax of your petitioner for the year 1918 legally, properly and correctly, should and must be determined and computed in accordance with the provisions of Section 327 (a) and (d) and Section 328 of the Revenue Act of 1918, for the following reasons: (1) It is impossible for the Commissioner of Internal Revenue, your petitioner, or anyone to determine what is the correct invested capital of your petitioner for the year 1918 as that term is defined in Section 326 of the Revenue Act of 1918; and (2) There are abnormal conditions affecting the capital and income of your petitioner which work upon it an exceptional hardship evidenced by gross disproportion between the tax paid by it and its tax when [fol. 6] computed by reference to representative corporations engaged in the same trade or business.

XII

Your petitioner made application to the Commissioner of Internal Revenue to have its tax liability computed, and its taxes assessed under and by virtue of the provisions of Sections 327 and 328 of the Revenue Act of 1918, but the Commissioner of Internal Revenue fails, refuses, and or neglects so to do, but continues illegally, erroneously and without warrant of law, to compute and assess said taxes under and by virtue of the provisions of Section 301 of the Revenue Act of 1918.

XIII

By way of a particular wherein and whereby it is impossible to determine what is the invested capital of your

petitioner, as defined by Section 326 of the Revenue Act of 1918, it has been the policy of your petitioner for a long period of years prior to the year 1918, with respect to plant additions and improvements, to charge large sums to expense instead of to its capital account.

XIV

By way of another particular illustrating the impossibility of determining the invested capital of your petitioner, there has been developed by your petitioner and used in the manufacture of its products a number of valuable secret processes, essential to the profitable operation of its business. No part of the cost of development of these secret processes has ever been capitalized, and the Commissioner of Internal Revenue has neglected, refused, and failed to make any adjustment of invested capital with respect to these items, the majority of which were developed several years prior to 1918, and detailed records showing the amount of labor and expense incurred in the said development are not now available.

XV

By way of another particular illustrating the impossibility of determining the invested capital of your petitioner, and the abnormal conditions affecting the capital and income of your petitioner, it respectfully shows that it has not undergone any sale, reorganization, or merger since the date of its organization on the 2nd day of May, 1887; that it is engaged in a stable business, and, has during the thirty-one years of its successful and consistently increasing business acquired a very large asset represented by its good will, which asset is not recorded on its books in any amount whatsoever, and the value of its good will has not been included in its invested capital in the computation made by the Commissioner of Internal Revenue, as shown by "Exhibit A." The value of the good will of your petitioner, computed in accordance with the provisions of the formula of the Commissioner of Internal Revenue as set out in A. R. M. 34 (2 C. B. 31), is $1,057,713.00, which amount has not been included in the invested capital of your petitioner by the Commissioner of Internal Revenue.

[fol. 8] XVI

By way of another particular illustrating the impossibility of determining the invested capital of your petitioner, and the abnormal conditions affecting the invested capital of your petitioner, it respectfully shows that, due to the ultra conservative policy of the management, large sums expended for plant, machinery, equipment, and other tangible assets have been charged to expense accounts rather than to its capital account, thus rendering your petitioner's true statutory invested capital materially greater than the amount appearing on its books.

XVII

By way of another particular illustrating the abnormal conditions affecting the income of your petitioner, it respectfully shows that, during the year 1918, the amount of borrowed money used by it in its business was abnormally large. On January 1, 1918, your petitioner was using in its business $114,834.91 of borrowed money, and on December 31, 1918, was using in its business borrowed money in the amount of $122,253.82, although its capital stock was only $100,000.00. At the beginning of the year 1918 its percentage of borrowed money to capital stock was 114.8, while at the end of the year 1918 its percentage of borrowed money to capital stock was 122.3.

XVIII

By way of another particular illustrating the abnormal conditions affecting the income of your petitioner during the [fol. 9] year 1919, the following sums as salary:

Garrett Cochran, President	$5,999.84
Jos. W. Cochran, Treasurer	4,000.00
C. La Rue Munson, Vice Pres.	2,000.00
Edgar Munson, Secretary	2,000.00
Robert Gilmore, Gen'l Manager	7,145.00

The total salaries paid to the officers of your petitioner for the year 1918 was $21,144.84, or 3.76 per cent of the taxable income of your petitioner for that year. These officers were actively engaged in and devoted all of their time to the

business of your petitioner, and the salaries paid to them were wholly inadequate for the services performed, and abnormally low when compared with the salaries paid officers of other corporations engaged in the same trade or business.

XIX

By way of a particular illustrating the exceptional hardship imposed upon your petitioner as evidenced by the gross disproportion between the tax paid by it and its tax when computed by reference to representative corporations engaged in the same trade or business, your petitioner shows that its Excess Profits Tax and War Profits Tax, as computed by the Commissioner of Internal Revenue under Section 301 of the Revenue Acts of 1918, is 63.87 per cent of its taxable income, whereas the average rate of Excess Profits Tax and War Profits Tax paid by representative corporations engaged in the same trade or business is not in excess of 55 per cent of their taxable income.

[fol. 10] XX

On, to wit, the 14th day of June, 1924, your petitioner duly filed with the Commissioner of Internal Revenue, of the Treasury Department, through the said Collector of Internal Revenue for the Twelfth District of Pennsylvania, to whom the said tax was paid, its claim for the refund of $[illegible], representing the amount by which its tax as computed by the Commissioner of Internal Revenue under Section 301 exceeds its tax when computed under and in accordance with the provisions of Section 327 and 328 of the Revenue Act of 1918, and your petitioner is informed and believes, and so believing avers, that the said Collector of Internal Revenue forwarded the said claim for refund to the said Commissioner of Internal Revenue of the Treasury Department.

XXI

The claim for refund filed by your petitioner was made on Form 843 of the Office of the Commissioner of Internal Revenue of the Treasury Department as required and was in all respects complete and regular, and in accordance with the laws and regulations relating thereto. The reasons set

forth by your petitioner in its said claim for refund were, among others, that your petitioner is entitled to have its taxes for the year 1918 determined in the manner prescribed in Sections 327 and 328 of the Revenue Act of 1918.

XXII

Although more than six months have elapsed since the [fol. 11] date of filing of the said claim for refund, no part of the amount properly refundable has been refunded to your petitioner.

XXIII

By way of a separate item, your petitioner respectfully shows that during the taxable year 1918 there was paid to it the sum of $25,209.09, representing the proceeds of a life insurance policy on the life of Garrett Cochran, its President, who died July 8, 1918. The said policy was issued by the Union Central Life Insurance Company of Cincinnati, Ohio, bearing number 506,267, being dated the 11th day of February, 1916, and your petitioner being named therein as the beneficiary, the premiums on said policy having been paid by your petitioner from its corporate funds.

XXIV

The Commissioner of Internal Revenue illegally included in his amended or revised computation of the income of your petitioner for the taxable year 1918 the proceeds of said life insurance policy to the extent of $24,682.44.

XXV

Your petitioner duly protested the inclusion in its taxable income of the said sum of $24,682.44, the proceeds of said life insurance policy, on the life of its deceased President, but the Commissioner of Internal Revenue refused and declined to exclude from the taxable net income of [fol. 12] your petitioner the proceeds of said life insurance policy, or any part thereof, and illegally and unlawfully levied upon and collected from your petitioner an alleged income and profits tax of $20,272.41 as a result of the inclusion of the proceeds of said life insurance policy in its taxable income.

XXVI

On, to wit, the 14th day of June, 1924, your petitioner duly filed with the Collector of Internal Revenue for the Twelfth District of Pennsylvania its claim for the refund of the said $20,272.41, illegally and unlawfully levied, assessed, and collected from it.

XXVII

The said claim for refund was made on Form 843 of the office of the Commissioner of Internal Revenue of the Treasury Department as required, and was in all respects complete and regular, and in accordance with the laws and regulations relating thereto. The reasons set forth by your petitioner in its said claim for refund were that the amount of said tax was an assessment upon income which included the proceeds of life insurance policies, not legally required to be included in its taxable net income under the decision of the Supreme Court of the United States in the Supplee-Biddle Hardware Company case.

XXVIII

Although more than six months have elapsed since the date of the filing of said claim for refund, no part of the amount properly refundable has been refunded to your petitioner.

[fol. 13] XXIX

Under Sections 1116 and 1117 of the Revenue Act of 1926, your petitioner may be allowed interest at the rate of 6 per cent per annum on the said sums of $[illegible] and $20,272.41, respectively, from the date of payment thereof.

XXX

Attached hereto, and made a part of this petition, is "Exhibit B," containing those sections of the Revenue Act of 1918 hereinbefore referred to in this petition.

XXXI

No action upon your petitioner's foregoing claims has been had before Congress or either House thereof, or any of the Departments of the Government, other than the Treasury Department, or in any other court; your petitioner is the sole owner thereof and the only party interested therein, and no assignment or transfer of the said claims, or any part thereof, or any interest therein, has been made; your petitioner has at all times borne true faith and allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement or comfort to any person, persons, or Government in rebellion against the Government of the United States, or at any time aided or abetted, or in any way given comfort to any Sovereign or Government that is, or ever has been, at war with the United States.

Wherefore, your petitioner prays:

[fol. 14] I

That this Court will render a judgment against the United States for the payment by the United States to your petitioner of the said sums of $100,000.00 and $29,272.41, respectively, together with interest thereon at the rate of 6 per cent per annum from the date of payment thereof, to wit, $80,084.85 paid on the 12th day of July, 1920, and the balance thereof paid on the 15th day of December, 1919.

II

That your petitioner may have such other and further relief as justice and the exigencies of this case may demand.

The Williamsport Wire Rope Co., by Logan Cunningham, Vice-President. James Walton, 1530 Park Building, Pittsburgh, Pa., Attorney of Record for Petitioner. Montrie Hitt, Clarence A. Miller, 1319 F Street N. W., Washington, D. C., of Counsel.

[fol. 15] *Duly sworn to by Logan Cunningham. Jurat omitted in printing.*

(Col. 16) — Exhibit "A" to Agreement Between

Copy of Commissioner's Computations

Williamsport Water Rate Company, Year Ended 12-31-18

Schedule 6

Computation of Total Tax (1918)

Excess Profits Tax:	Income	Tax
Net income for taxable year	$102,813.36	
Less excess profits credit	5,014.20	
Balance	$477,799.16	
Taxable at 20%	120,021.24	$20,004.42
Taxable at 65%	357,777.91	232,555.64
	$477,799.16	$208,562.06
War Profits Tax:		
Net Income for taxable year	$102,813.36	
Less war profits credit	114,238.51	
Taxable at 80%	$448,573.65	$358,858.92
Less excess profits tax		208,562.06
War profits tax		$150,296.86
Total excess profits and war profits tax		$358,858.92
Income Tax:		
Net income for taxable year	$102,813.36	
Less Interest on obligations of United States not exempt [Col. 17]	891.12	
War profits and excess profits tax	358,858.92	
Exemption	2,000.00	
	360,961.16	
Taxable at 12%	$20,852.20	$2,502.26
Total tax		$361,361.18

Previously assessed:	Income	Tax
Original assm't account No. 40046	$300,381 77	
Additional assessment June 1919—p. 10, L. 6	8,064 85	
		36,476 62
Overassessed		$12,283 09

[fol. 18] EXHIBIT "B" TO AMENDED PETITION

Revenue Act of 1918

SEC. 301. (a) That in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected, and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

First Bracket

30 per centum of the amount of the net income in excess of the excess profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

Second Bracket

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital.

Third Bracket

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets.

(b) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation (except corporations [fol. 19] taxable under subdivision (c) of this section) a tax equal to the sum of the following:

First Bracket

20 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 25 per centum of the invested capital.

Second Bracket

40 per centum of the amount of the net income in excess of 25 per centum of the invested capital.

(c) For the taxable year 1918 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation which derives in such year a net income of more than $10,000 from any Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive, a tax equal to the sum of the following:

(1) Such a portion of a tax computed at the rates specified in subdivision (a) as the part of the net income attributable to such Government contract or contracts bears to the entire net income. In computing such tax the excess-profits credit and the war profits credit applicable to the taxable year shall be used.

(2) Such a portion of a tax computed at the rates specified in subdivision (b) as the part of the net income not attributable to such Government contract or contracts bears to the entire net income.

(d) (1) For the purpose of determining the parts of the income attributable to such Government contract or contracts, the proper apportionment and allocation of the deductions with respect to gross income derived from such Government contract or contracts and from other sources, respectively, shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In any case where the full amount of the excess-profit credit is not allowed under the first bracket of subdivision (a) or (b), by reason of the fact that such credit is in excess of 20 per centum of the invested capital, the part not so allowed shall be deducted from the amount in the second bracket.

(c) For the purposes of the act approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal control for the just compensation of their owners, and for other purposes," the tax imposed by this title shall be treated as levied by an Act in amendment of Title II of the Revenue Act of 1917.

SEC. 325. (a) That as used in this title—

The term "intangible property" means patents, copyrights, secret processes and formulae, good will, trademarks, trade brands, franchises, and other like property;

[fol. 21] The term "tangible property" means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, leaseholds, and other property other than intangible property;

The term "borrowed capital" means money or other property borrowed, whether represented by bonds, notes, open accounts, or otherwise;

The term "inadmissible assets" means stocks, bonds, and other obligations (other than obligations of the United States), the dividends or interest from which is not included in computing net income, but where the income derived from such assets consists in part of gain or profit derived from the sale or other disposition thereof, or where all or part of the interest derived from such assets is in effect included in the net income because of the limitation on the deduction of interest under paragraph (2) of subdivision (a) of section 234, a corresponding part of the capital invested in such assets shall not be deemed to be inadmissible assets;

The term "admissible assets" means all assets other than inadmissible assets, valued in accordance with the provisions of subdivision (a) of section 326, section 330, and section 331.

(b) For the purposes of this title, the par value of stock or shares shall, in the case of stock or shares issued at a nominal value or having no par value, be deemed to be the fair market value as of the date or dates of issue of such stock or shares.

[sec. 22] SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section):

(1) Actual cash bona fide paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid in surplus: Provided, That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid in surplus. The Commissioner shall furnish a copy of such records and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits, not including surplus and undivided profits earned during the year.

[sec. 22] (b) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(c) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued

therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: Provided, That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

(b) As used in this title the term "invested capital" does not include borrowed capital.

(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a [fol. 24] corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

The average invested capital for the prewar period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years.

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(a) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to [fol. 25] abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 223 of Title II) consists of gains, profits, commissions, or other income, derived on a cost plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner [fol. 26] shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commis-

sioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

[fol. 27] (e) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such records and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

[fol. 28] IV. Special Demurrer to Amended Petition. Filed January 28, 1927

Comes now the United States, by the Attorney General, and, demurring specially to the first alleged cause of action of the amended petition filed herein (paragraphs 1 to 22, inclusive), states as grounds therefor:

1. That the facts alleged in paragraphs 1 to 22, inclusive, in the amended petition do not constitute a cause of action.

2. That the facts alleged on paragraphs 1 to 22, inclusive, in the amended petition do not constitute a cause of action, within the jurisdiction of this court.

Respectfully submitted.

Herman J. Galloway, Assistant Attorney General.
Thaddeus G. Benton, Attorney.

V. General Traverse—Filed January 28, 1927

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the plaintiff herein, denies each and every allegation contained in paragraphs XXIII to XXXI incl., and asks judgment that the petition be dismissed, as to said paragraphs.

Herman J. Galloway, Assistant Attorney General.

T. G. B.

VI. Argument and Submission of Case on Demurrer

On February 21, 1927, the special demurrer in this case was argued and submitted by Mr. Thaddeus G. Benton, for the defendant, and by Mr. Clarence A. Miller, for the plaintiff.

[fol. 29] VII. Opinion—Filed May 2, 1927

On Demurrer

Booth, Judge, delivered the opinion of the court:

This is a tax case. The petition alleges a right of recovery upon two items. To the first item the defendant demurs. The facts alleged to sustain the cause of action are as follows: The plaintiff, a Pennsylvania corporation engaged in the manufacture of wire rope, on June 15, 1919, filed with the Collector of Internal Revenue for the proper district its income tax return for the year 1918. Plaintiff then conceded an income, excess and war tax liability upon the return so filed of $206,381.77, and the same was duly paid in four installments without protest. Subsequently

the Commissioner of Internal Revenue, through Revenue Agents, made an examination of plaintiff's books of account, and on April 14, 1920, advised the plaintiff that a revised computation of its income tax return had increased its tax liability for the year 1918 to the extent of $89,094.85. Plaintiff protested this action of the Commissioner, but the Commissioner made the additional assessment, and it was finally paid by the plaintiff under protest. Thereafter the Commissioner discovered an error in his computation resulting in an overpayment of $12,393.09, which amount was on June 10, 1924, refunded to the plaintiff, leaving an aggregate tax assessed, levied, and paid by the plaintiff upon its return, of $383,083.53.

On June 14, 1924, the plaintiff filed with the Commissioner a claim for a refund of $100,000, stating therein that the amount so claimed represented the amount by which its tax computed under section 301 of the Revenue Act of 1918 exceeded its tax computed under Sections 327 and 328 of the Revenue Act of 1918, insisting upon a right to have its tax liability computed in accordance with Sections 327 and 328 supra. The Commissioner declined to refund. The petition further alleges that as a matter of fact as well as law plaintiff is entitled to have its excess profits tax and war profits tax computed in accordance with Sections 327 and 328 of the Revenue Act and not under the provisions of section 301 of the same law. To this end the allegation is made that it is impossible for the Commissioner or anyone else to determine the correct amount of plaintiff's invested capital as defined in section 326 of the Revenue Act of 1918; [fol. 39] that abnormal conditions exist affecting the capital and income of the plaintiff which work upon it an exceptional hardship, evidenced by gross disproportion between the tax paid by it and its tax computed by reference to representative corporations engaged in the same trade or business. To sustain this allegation particular instances are cited. First, it is alleged that plaintiff pursued a policy of charging large sums expended for plant additions and improvements to an expense account and not to capital; second, that prior to the year 1918 plaintiff developed valuable secret processes essential to the profitable operation of its business, and no part of the cost thereof has ever been capitalized, and the Commissioner ignored this fact in mak-

ing up his adjustment of plaintiff's invested capital; third, that plaintiff, since its organization, has never undergone a reorganization or merger, but has since its organization in May, 1887, conducted an increasing and important business and thereby acquired a good will which asset is not recorded on its books and the value thereof was ignored by the Commissioner in ascertaining plaintiff's invested capital; that under regulations of the Commissioner, its good will is an asset of the value of $1,037,713; fourth, that plaintiff, during the year 1918 borrowed money to use in its business; that on January 1, 1918, plaintiff was using in its business $114,834.91, borrowed funds, and on December 31, 1918, for a like purpose was using $122,353.82, that its capital stock was $100,000; that at the beginning of the year its percentage of borrowed money to capital stock was 114.8 per cent, and at the end of the year 122.3 per cent; fifth, it is alleged that the salaries of its officers were abnormally low, averaging but 3.76 per cent of its taxable income for the year, and finally concluding with the allegation that a comparison of the rate of tax imposed upon the plaintiff with the rate imposed upon representative corporations engaged in a like trade or business would disclose the fact that as to the plaintiff the rate exacted is 63.87 per cent of its taxable income, whereas as to representative corporations the rate is not in excess of 56 per cent of their taxable income. The prayer for judgment is somewhat obscure. If we correctly apprehend it, suit is for the recovery of $100,000 on this item with interest thereon from date of the payment of the final installment, viz: December 31, 1919.

Sections 327 and 328 of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1066), provide in terms as follows:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of

property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to [fol. 31] abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income derived on a cost plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid, together with interest at the rate of one half of 1 per centum per month, on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such [fol. 32] record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

Section 326 of the Revenue Act of 1918 (40 Stat. 1062) defines invested capital and is in terms as follows:

"(a) That as used in this title the term 'invested capital' for any year means (except as provided in subdivisions (b) and (c) of this section):

"(1) Actual cash bona fide paid in for stock or shares;

"(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of

such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: Provided, That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in Section 257;

"(3) Paid in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

"(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

"(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: Provided, That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

"(b) As used in this title the term 'invested capital' does not include borrowed capital.

"(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

"(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a [fol. 33] year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

"The average invested capital for the pre-war period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years."

A tax case in this court is a suit against the United States founded under our jurisdictional act (Section 145, Judicial Code) upon a law of Congress. The right to sue for internal revenue tax is conditioned upon its payment, application for a refund and denial of the same. Rock Island, Arkansas & Louisiana R. R. Co. v. United States, 254 U. S. 141. Under the allegations of the petition, heretofore recited, it is obvious that the present suit is for a recovery of an alleged illegal tax exaction resulting from the alleged failure of the Commissioner to apply to plaintiff's tax return the applicable sections of the revenue law, i. e. Sections 327 and 328, supra. Plaintiff does not allege that if section 301 of the Revenue Act of 1918 has been legally applied in the assessment and levy of the taxes involved, an over or illegal assessment follows, and judgment for the amount paid thereunder is recoverable. On the contrary, the gravamen of the complaint is that Sections 327 and 328 of the Statute are the applicable sections of the law under which the assessment and levy should have been made, and if so made, would result in a difference of $100,000 in the amount paid and what should have been paid. The court is manifestly without authority to compute a tax under Sections 327 and 328 of the Revenue law. The Commissioner

has refused to apply the sections as requested, and we have no means to compel him to do so. Sections 327 and 328 of the statute point out the method to be pursued by the Commissioner in applying special assessment. In his office and available to him, are the facts, the records, voluminous and important, upon which the Commissioner relies in making comparisons with representative corporations engaged in a like trade or business, and upon no possible hypothesis has the court any means of knowing, in the absence of an official computation by the Commissioner, what the amount of plaintiff's tax would be under the conditions set forth in the law. Until the Commissioner has acted, and the record of his actions is before the court, we are powerless to determine that he should have done something which under the law he positively refuses to do.

Plaintiff admits that internal-revenue taxes are justly due from it to the United States. The issue presented by the petition goes only to the amount. We are not asked to set aside the assessment and levy made under section 301 and award judgment for all the taxes paid thereunder. The relief sought by the plaintiff is a judgment founded upon a law of Congress under which the plaintiff has not incurred a tax liability, under which it has been assessed no taxes, and under which it has paid no taxes. The plaintiff's taxes were assessed under Section 301. They were levied and collected under that section, and no complaint is made that if the section is applicable the amount assessed and paid is illegal. The plaintiff, in our view of the case, has mistaken the remedy. As said by the Supreme Court in the Rock Island case, supra, "Men must turn square corners when they deal with the Government. If it attaches even purely [fol. 34] formal conditions to its consent to be sued those conditions must be complied with." Clearly the plaintiff has paid no taxes under Sections 327 and 328 of the statute. The Commissioner has not levied or assessed any under the sections, and no claim for refund has been made or refused for any sum or sums exacted of the plaintiff under the above sections. What sum the Commissioner might exact or might have exacted under the special assessment provisions relied upon is a problem with which under the petition we are not concerned, and until he does apply the provisions the court is powerless to proceed.

In addition to what has been said, the provisions of the revenue law authorizing special assessment confer upon the Commissioner discretionary power. He is vested by Congress with the right to determine from the facts of each case when the abnormal conditions obtain to warrant the application of the law, which by its very terms indicates that only in exceptional cases is he to resort thereto. The plaintiff does not question the authority of Congress to confer the jurisdiction upon the commissioner, and does not challenge in the petition his good faith or charge abuse of discretion in refusing it classification under the special assessment sections. Plaintiff did not in the beginning question the amount of taxes it should pay, the return made by it, and the taxes due as per the same were voluntarily paid. No complaint was lodged against the exaction until additional taxes were assessed and demanded. Then for the first time the plaintiff insists upon its alleged right to special assessment. Then and only then was the commissioner acquainted with its allegations of an abnormal status and the many unusual factors which prevented him from ascertaining invested capital under Section 326. The presumption is that the Commissioner discharged his duty under the law. In the absence of any information to the contrary, we may not presume that the Commissioner found the statutory difficulties which precluded an assessment under Section 301. On the contrary, his inaction indicates that no such difficulties were encountered. We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder, and a refund asked and refused. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due. Louisiana v. McAdoo, 234 U. S. 627; United States v. Balcsack, 250 U. S. 328; Ray Consolidated Copper Co. v. United States, 268 U. S. 373.

The demurrer to the first item of the petition will be sustained, and as to that item the petition is dismissed. It is so ordered.

Moss, Judge; Graham, Judge; Hay, Judge; and Campbell, Chief Justice, concur.

[fol. 35] VIII. JUDGMENT—May 2, 1927

At a Court of Claims held in the City of Washington on the Second day of May, A. D., 1927, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the amended petition. Upon consideration whereof the court is of the opinion that the demurrer to the first item of the amended petition is well taken. It is therefore adjudged and ordered that the defendant's said demurrer to the first item of the amended petition be sustained, and as to that item the amended petition is dismissed.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 32,789. Court of Claims. Term No. 337. The Williamsport Wire Rope Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed June 29th, 1927. File No. 32,789.

(5868)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 28, 1927

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

AUG 11 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

NO. 337.

THE WILLIAMSPORT WIRE ROPE COMPANY,
Petitioner,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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IN THE

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THE WILLIAMSPORT WIRE ROPE COMPANY,
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THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

Opinion Below.

The opinion of the Court of Claims is not yet officially reported. It has been set forth verbatim in the transcript, beginning on page 24.

II.

Jurisdiction.

The judgment of the Court of Claims, sought to be reversed, was entered May 2, 1927 (tr. 33). Jurisdiction to issue the writ is found in the provisions of Section 240 (b) and (c) of the Judicial Code, as amended by the Act of February 13, 1925.

III.

Question Presented.

The question presented is whether a Federal Court has jurisdiction to review the action of the Commissioner of Internal Revenue in computing or refusing to compute (the latter is the case here) a corporation's income and profits tax under the provisions of Sections 327 and 328 of the Revenue Act of 1918, 40 Stat. L. 1057 96, C. 18. In other words, is the application or non application of these two particular sections of the Revenue Act within the exclusive discretion of the Commissioner of Internal Revenue?

IV.

The Statute.

The relevant sections of the statute are 301, 325, 326, 327 and 328. They are quoted verbatim in the transcript beginning on page 17. The essential parts thereof read:

> "Sec. 327. That in the following cases the tax shall be determined as provided in section 328:
>
> (a) Where the Commissioner is unable to determine the invested capital as provided in section 326;
>
> • • • • • • •
>
> (d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to (fol. 25) abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross dispro-

portion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 223 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner (fol. 26) shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of

business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due."

* * * * * * *

V.

Statement of the Case.

The facts are adequately stated in the transcript, beginning on page 1. A summary of the facts also appears in the preamble to the opinion of the learned court below, pages 24, 25 and 26.

In briefest possible form, the facts are—

That petitioner, a Pennsylvania corporation, duly filed its income and profits tax return for the calendar year 1918, which return showed a total tax liability of $306,381.77, and the tax shown thereby was paid within the time prescribed by law. The amount of the tax was in excess of 50% of the company's taxable income, but the taxpayer did not avail itself of the right granted under Section 328 (b), of paying as tax, a sum equal to 50% of its net income and petitioning for assessment under Section 328. Subsequently, the Commissioner of Internal Revenue caused an examination to be made of petitioner's books of account, and as a consequence of said examination, a number of alleged adjustments or corrections were made in petitioner's figures, the most consequential of which was an alteration in the book value of petitioner's inventories of raw material, work in process and finished merchandise. The Commissioner, through his field revenue agents, contended that the amount of petitioner's January 1, 1918, inventory should be increased $229,326.32, and that its closing inventory on December 31, 1918, should be increased $317,178.54. Through this change in the book value of the inventories, an alleged additional tax of $89,091.85 was computed against

the petitioner and, despite its protests, the amount was assessed, levied and collected on July 12, 1920. Petitioner contends that through this arbitrary adjustment of its inventories, which adjustments were carried all the way back to the year 1914, an abnormal condition was forced upon it, and it was thereby entitled to a computation of its tax under Section 328. Accordingly, on June 14, 1924, petitioner drafted and filed with the Commissioner, a claim for refund of $100,000.00, stating that the amount so claimed represented the amount by which the tax as computed by the Commissioner under Section 301 exceeded the tax when computed under Sections 327 and 328. After extended conferences and negotiations the Commissioner declined to refund and suit was thereafter duly instituted in the Court of Claims. In its petition (p. 9, tr.) taxpayer set forth a number of particulars of abnormality in both its taxable income and invested capital. On January 18, 1927, the defendant filed a special demurrer, attacking the sufficiency of the petition, and, secondly, raising the question of the jurisdiction of the court. On argument upon the demurrer on February 21, 1927, the defendant confined the issue to the question of the court's jurisdiction, and the court, in its opinion (tr. p. 24) sustained the demurrer upon the grounds of lack of jurisdiction.

VI.

Specification of Error Intended to Be Urged.

The error which petitioner urges as grounds for granting the writ is—

> The court erred in sustaining the demurrer and dismissing the amended petition as to the first cause of action.*

*NOTE—Plaintiff's second cause of action has been conceded and defendant has made settlement thereof by payment in full.

VII.

Argument.

If anyone were to assert that the legislative body of a democracy, with a republican form of government in the twentieth century, had deliberately passed a law placing it within the power of one man to say what the amount of tax of every corporation in the whole land should be, such assertion would be called incredible. And if the power of this one man to name the tax figure for the whole nation were made absolutely unreviewable and without appeal to any court, we would call that tyranny, unheard of in any civilized country in the world. Even the adherents of King George III claimed no such prerogative. Yet, incredible as it may seem, the decision of the Court of Claims means that Congress did that very thing.

The law provides for two ways of determining the tax liability. The first, under section 301, employs a mathematical formula wherein the amounts of taxable income and of invested capital are the

basic factors. But Congress recognized that under some circumstances this formula might be unworkable or result in hardship and injustice, and therefore provided, under sections 327 and 328, that in such cases there should be a second method of computing the amount of the tax. This method was to apply to the taxpayer the same average rate of tax as that of his representative competitors, a tax by comparison.

VII (b)

Short Digest of Lower Court's Opinion.

The learned court below says that the application of sections 327 and 328 is discretionary with the Commissioner and that it has no means to compel him to do that which he refuses to do.

The first reason in support of its conclusion (p. 31, tr.) is stated:

> "In his (Commissioner's) office and available to him, are the facts, the records, *voluminous* and *important*, upon which the Commissioner relies * * * upon no possible hypothesis has the court any means of knowing * * * what the amount of the tax would be * * *."

Because a thing may be burdensome or troublesome to a court, is that any reason to refuse to undertake it. The skillful counsel for the Commissioner bore heavily upon the argument that by taking jurisdiction the court would find itself involved with a hopeless mass of detailed statistics. But the truth is that one single sheet of paper from the Commissioner's files will show in summary form, all and everything necessary to correctly compute the tax

under sections 327 and 328. A photostatic copy of this document is attached hereto, last page, *infra*.

The second reason in support of its conclusion (p. 31, tr.) is stated –

> "The plaintiff paid no taxes under sections 327 and 328 • • • and until he (the Commissioner) does apply the provisions the court is powerless to proceed."

This evidently means that if the Commissioner were to apply sections 327 and 328 against the will of the taxpayer, the learned court below would then take jurisdiction. If that be true, how can it be asserted that the application or non-application of sections 327 and 328 is discretionary. It certainly cannot be discretionary with the Commissioner to not do a thing for one taxpayer and yet be subject to court review if he does the same thing to another taxpayer.

VII (c)

Congress Did Not Give the Commissioner Unreviewable Discretion.

By the plain wording of the statute this is apparent.

Section 327 provides in part:

> "That in the following cases the tax *shall* be determined as provided in Section 328." (Italics ours.)

There is no "discretion" about the word "shall". In fact, it is indicative of a mandate.

> "'Shall' ought undoubtedly to be construed as meaning 'must' for the purposes of sustaining or enforcing an existing right."

West Wisconsin Ry. Co. v. United States, 94 U. S. 100; *Martin v. Hunter*, 14 U. S., 304.

Section 328 provides in part that—

"(a) In the cases specified in Section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer • • • as *the average tax of representative corporations* engaged in a like or similar trade or *business* bears to their average net income • • • for such year. • • •

"In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations • • • which are, as nearly as may be, *similarly circumstanced* with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances." (Italics ours.)

The use of the mandatory language and the very detailed requirements of Section 328 belie any suggestions that Congress gave the Commissioner the discretionary power of "fixing rates" and intended that he be sole arbiter, judge and executioner, and that his determinations can not be reviewed, not even by the judiciary, because "the king can do no wrong."

The Commissioner and his assistants are just as likely to err in determining a tax liability under Section 328 as under Section 301.

VII (d)

Action of the Commissioner Under Similar Acts Held Reviewable.

Congress, in enacting the Revenue Act of 1918, and other Revenue Acts, has been generous in conferring upon the Commissioner of Internal Revenue authority "to find", "to fix", "to determine" and the like, using such phrases as "to the satisfaction of the Commissioner", "whenever in the opinion of the Commissioner", "reasonable allowance", etc. These have not been held to confer upon the Commissioner an unreviewable discretionary power. In all of these instances, as well as in many others of similar character, the courts and the Board of Tax Appeals have reviewed the judgment of the Commissioner. What has really happened in the present case is that the defendant has confused the words "judgment" and "discretion".

In the administration and application of tax laws the Commissioner is required to exercise some judgment, but his decisions involving the exercise of that judgment are always subject to review. The following instances are cited showing the review of the judgment of the Commissioner. Unless otherwise noted, the sections referred to are those of the Revenue Act of 1918, the same Act as is here involved.

Section 203 provides:

> "That whenever *in the opinion of the Commissioner* the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as

conforming as nearly as may be *to the best accounting practice* in the trade or business, and as most clearly reflecting the income. (Italics supplied.)

Whether the use of inventories is necessary to determine the income of a taxpayer, and what is the best accounting practice, are questions decided by the Commissioner which have been reviewed by the Board of Tax Appeals. Among the many decisions the following may be cited:

Appeal of The Thomas Shoe Company, 1 B. T. A., 124;
Appeal of Champion Store Co., 1 B. T. A., 656;
Appeal of George C. Peterson Co., 1 B. T. A., 690;
Appeal of When Clothing Co., 1 B. T. A., 973;
Appeal of The Russ Co., 2 B. T. A., 266.

Section 204 (b) provides that:

"If for any taxable year * * * it appears upon production of evidence *satisfactory to the Commissioner* that any taxpayer sustained a net loss, the amount of such net loss, shall under regulations prescribed by the Commissioner with the approval of the Secretary be deducted from the net income of the taxpayer for the preceding taxable year; * * *." (Italics supplied.)

Section 204 (a) defines in detail the term "net loss". In spite of the language used, this question has been before both the Board of Tax Appeals and the courts, and the decisions of the Commissioner

have been reviewed. Among the many cases decided by the Board of Tax Appeals, we cite—

Appeal of Butler's Warehouses, Inc., 1 B. T. A., 851.

The Court of Claims has reviewed the decision of the Commissioner under this section—

Auburn and Alton Coal Company v. United States, 61 Ct. Cl., 438.

The Board of Tax Appeals reviewed the decision of the Commissioner under a similar provision of the Revenue Act of 1921.

Appeal of J. H. Harrington, 1 B. T. A., 11; *Appeal of Carroll Chain Co.*, 1 B. T. A., 38.

In the latter case the Commissioner conceded the jurisdiction of the Board of Tax Appeals (1 B. T. A., 163).

Section 212 (b) provides that:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period • • • in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as *in the opinion of the Commissioner* does clearly reflect the income. • • •" (Italics supplied.)

It does not appear of record that the Commissioner of Internal Revenue has ever claimed to have

"unreviewable discretion" under this section. At any rate, his decisions thereunder have been reviewed by the Board of Tax Appeals.

Appeal of Henry Birn, 1 B. T. A., 416;
Appeal of Harry & Kate Canaan, 1 B. T. A., 720;
Appeal of Max & Jennie Kass, 1 B. T. A., 1115;
Appeal of Morris Feuer, 1 B. T. A., 1113;
Appeal of Theresa Goodman, 1 B. T. A., 915;
Appeal of David Welch, 2 B. T. A., 64;
Appeal of Union Market, Inc., 2 B. T. A., 429.

The courts have also reviewed the decision of the Commissioner under this section. See, for instance—

Matter of the U. S. Metal Goods Co., 4 F. (2d), 871;
In re Sheinman, Bankrupt (U. S. D. C., E. D. Pa., July 30, 1926), 14 Fed. (2d), 323.

Section 214 provides:

"(a) That in computing net income there shall be allowed as deductions:

"(1) All the *ordinary and necessary expenses* paid or incurred during the taxable year in carrying on any trade or business, including a *reasonable allowance* for salaries or other compensation for services actually rendered, • • •."

• • • • • • •

"(8) A *reasonable allowance* for the exhaustion, wear and tear of property used in the trade or business, • • •."

• • • • • • • •

"(10) In the case of mines, oil and gas well, other natural deposits, and timber, a *reasonable allowance* for *depletion and for depreciation* of improvements, * * *." (Italics supplied.)

No provision of any revenue law involves the use and application of a higher degree of mature judgment than these provisions. Yet, the decisions of the Commissioner as to what expenses are "ordinary and necessary", what salaries and allowances are "reasonable", have been reviewed many times, by both the Board of Tax Appeals and the Courts. Among the many decisions we cite—

Appeal of L. Z. Dickey Grocery Company, 1 B. T. A., 108;
Appeal of Arthur H. Ingle, 1 B. T. A., 595.

In *Lynch v. Alworth Stephens Co.*, 294 Fed., 190, affirming 278 Fed., 959, the court revitwed the decision of the Commissioner under Section 12, Second, (b) of the Revenue Act of 1916, similar to paragraph (10) above quoted.

See also,

Cohen v. Lowe, 234 Fed., 474;
N. C. & St. L. Ry. Co. v. U. S., 269 Fed., 351.

Section 234 provides:

"(a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

"(7) A *reasonable allowance for the exhaustion*, wear and tear *of property* used in the trade or business, including a reasonable allowance for obsolescence." (Italics supplied.)

The decision of the Commissioner as to what is a "reasonable allowance for the exhaustion, wear and tear of property" was reviewed by the Board of Tax Appeals in *Appeal of The Farmers Grain Co.*, 1 B. T. A., 605.

There is nothing in which there exists more vagueness than in the determination of "value" for purposes of computing taxes, yet the courts have never regarded the Commissioner's right to determine value to be discretionary, and the books abound with cases wherein the decisions of the Commissioner have been reviewed by both the courts and the Board of Tax Appeals. Among the court decisions we may cite—

Dupan v. Miles, 276 Fed., 401;
Curley v. Tait, 276 Fed., 840;
Miles, Coll., v. Safe Deposit & Trust Co., 259 U. S., 247, affirming 273 Fed., 822;
Towne v. McElhenett, 274 Fed., 960;
Pitney v. Duffy, 291 Fed., 621;
Walter v. Duffy, 287 Fed., 41;
Great Northern Railway Co. v. Lynch, 292 Fed., 903;
Castner, Curran & Bullitt, Inc., v. Lederer, 275 Fed., 221;
Central Union Trust Co. v. Edwards, 287 Fed., 324, affirming 282 Fed., 1008;
Lynch v. Turrish, 247 U. S., 221.

VII (e)

Application of Law to Exceptional Cases.

The opinion of the learned court below continues (p. 32 tr.):

> "• • • the law, by its very terms indicates that only in exceptional cases is he (the Commissioner) to resort thereto."

This might be conceded, but as being no reason for denying jurisdiction. But this court will take judicial notice of the fact that a whole section of the Income Tax Unit, with hundreds of clerks has been doing nothing else but pass upon section 327 and 328 cases ever since 1918. It will also take judicial notice of Senate Report No. 27, 69th Congress, 1st Session, of the Select Committee of Investigation of the Bureau of Internal Revenue, page 259 *et seq.* There is the report of thousands of cases under sections 327 and 328.

VII (f)

The Urgent Need for Court Review.

The result of vesting anyone, even the most well intending, with unreviewable discretion, is inevitably favoritism and abuse. The Senate Committee so found it, and in its report, *supra*, page 214, stated—

> "The bureau's methods of administering the special assessment provision of the act have resulted in *gross discrimination between taxpayers.*"

VII (g)

There Is No Other Remedy.

The learned court below, in an income tax case, where the Commissioner contended that his judgment and discretion were unreviewable, said with great emphasis, that there was no such thing as unreviewable discretion, and

> "that such a contention seems so clearly untenable as to obviate any need of discussion, and that to sustain it would be to deprive taxpayers of a right accorded them by statute, and *leave them without a remedy* where remedy is provided."
>
> *Betts v. United States*, 62 Court of Claims, 10. Decided Feb. 1, 1926.

Yet, in the instant case, the learned court, after pointing out that the tax exacted, both the original amount and the alleged additional tax, was assessed under Section 301 (p. 31, tr.), says—

> "The plaintiff, in our view of the case, has mistaken the remedy."

It is well settled that there can be no remedy by mandamus. It is similarly definitely settled that it cannot be by injunction to restrain the Collector (*Graham v. du Pont*, 262 U. S., 234).

If there is any possible way to test the legality or correctness of the amount of an income tax exaction other than to pay the tax and sue to recover, what can it be?

VII (h)

The Power of Congress to Confer Unreviewable Discretion Upon the Commissioner.

The lower court continues (p. 32, tr.) by stating—

> "Plaintiff does not question the authority of Congress to confer the jurisdiction upon the Commissioner, nor challenge his good faith or charge abuse or discretion. * * *"

Plaintiff's counsel, both in the lower court and again here, insist: 1st, that Congress did not vest the Commissioner with any such unreviewable jurisdiction, either expressly or impliedly; and, 2nd, that if such a delegation of unlimited authority were attempted, it would be utterly unconstitutional for reasons so patent and obvious as to be unnecessary to point out.

Judge Dickinson, in the District Court for the Eastern District of Pennsylvania, states the rule with precision and clarity:

> "To hold, as we are asked to do, that the levy of the tax of the Commissioner is conclusive of the liability of the taxpayer, would be to render the Act of Congress wholly nugatory."
>
> *U. S. v. Radcliffe*, 14 Fed. (2nd), 989. Decided June 30, 1926.

The opinion of the lower court continues—

> "Plaintiff did not in the beginning question the amount of taxes it should pay. * * * No complaint was lodged against the exaction until additional taxes were assessed and demanded.

> Then for the first time the plaintiff insists upon its alleged right to special assessment."

It is not surprising that a court, heavily burdened with tax litigation, should now find it hard to understand that any taxpayer would be so credulous as to believe that if the initial payment of its tax were excessive, the amount of the excess would be voluntarily refunded by the Commissioner; a taxpayer who would take that risk rather than engage in a controversy with his government during a time of national peril. This petitioner confesses it did so. Moreover, no claim for assessment under sections 327 and 328 would ever have been made if the Commissioner had left the company unmolested. But when the Revenue Agents figured out $89,094.85 alleged additional tax by insisting that they, several years afterwards, were more competent to value the taxpayer's inventories than the company officials themselves,—then the company most properly said—

> "if you are going to force this absurd abnormal conditions upon us, we should have and must have assessment by comparison under sections 327 and 328"

It is true that counsel made no specific charge of lack of good faith or abuse of discretion against the Commissioner. But was that necessary? And what bearing could it have on the question of jurisdiction? What counsel did charge, and does now charge, is that the Commissioner has not proceeded according to law. Whether he did so innocently or deliberately, the amount of our damage is the same, and our only possible relief is to be given a "day in court" to prove the merits of our contention.

VII (1)

An Analagous Case.

This court now has before it the case of *Blair, Commissioner, plaintiff in error, v. Oesterlein Machine Company*, writ of *certiorari* granted to the Court of Appeals in the District of Columbia, May, 1927. That case is an exact analogy to the instant case, except that the Oesterlein Company fought off the alleged additional tax until 1924, when Congress created the Board of Tax Appeals. It then appealed to the Board. There, as here, the Commissioner contended he had "unreviewable discretion". He successively made the same contention in the Supreme Court of the District and the Court of Appeals. All three tribunals have unanimously decided against him. The opinion of the Court of Appeals, handed down January 3, 1927 (17 Fed. (2nd), 663), though cited to and urged upon the learned court below, was neither distinguished nor mentioned.

VII (J)

Conclusion.

The opinion of the learned court below concludes by saying—

> "We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder * * * . We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due."

That means that if the Commissioner had granted us assessment under sections 327 and 328 and our complaint was that he made the computation thereunder incorrectly and improperly through having used unrepresentative concerns as comparatives in arriving at his rate of tax, then the court would have jurisdiction. But if the Commissioner flatly denies assessment under 327 and 328, there is no jurisdiction in the court. Can it be that any court could have jurisdiction to determine whether a thing has been done correctly and properly and still have no jurisdiction to determine whether it should be done at all? Or, assume that we were in court asking for assessment under section 301 and complaining that the Commissioner has incorrectly and unlawfully forced upon us assessment under sections 327 and 328. Under the reasoning of the learned court below, there would be no jurisdiction because we had paid no tax under 301.

The error of the learned court below arises from assuming that the law provides for two distinct and different taxes,—one under section 301 and the other

under 327 and 328. But the fact is there is only one tax, and that is the correct tax, which may be under either of the sections, according to the circumstances. In our complaint, which for the purpose of demurrer must be taken as true, we have alleged the imposition by the Commissioner of an incorrect excessive tax, the payment thereof, a refund filed and rejected. No matter how burdensome it might be to hear our case (which it will not be at all) and no matter what formula, method or line of reasoning the Commissioner employed in his computations, the jurisdiction is unaffected and the question remains,—*has the petitioner been forced to pay an excessively illegal tax under the law?*

Respectfully submitted,

JAMES WALTON,
Attorney for Petitioner.

August 2, 1927.

CLARENCE A. MILLER,
HITT AND MILLER,
Washington, D. C.
Of Counsel.

Treasury Department
Internal Revenue Bureau
Form 7305-Aug., 1921.

INCOME TAX (TECHNICAL) SPECIAL ASSESSMENT SECTION

APPEN

Comparative Statistics Data Sheet - Special Cases - 19

Comparative Statistics No: _____ Nature of Business _____

	Appellant	Comparative No. 1	Comparative No. 2	Comparative No. 3	Comparative No. 4	Comp No
Location						
Date of Organization						
1. Invested capital as adjusted						
2. Statutory intangibles						
3. Adjustments for inadmissible assets						
4. Interest-bearing indebtedness						
5. Noninterest-bearing indebtedness to stockholders						
6. Gross sales						
7. Other income						
8. Cost of goods sold						
9. Ordinary and necessary expenses						
10. Compensation of officers						
11. Repairs						
12. Interest						
13. Taxes						
14. Bad debts						
15. Exhaustion, wear and tear (including obsolescence)						
16. Amortization of war facilities						
17. Depletion						
18. Special deductions from income						
19. Net income						
20. Percentage of net income to gross sales						
21. Percentage of net income to adjusted invested capital						
22. Percentage of cost of sales to gross sales						
23. Excess profits						
24. War profits						
25. Net income per unit of business						
26. Profits tax						
27. Percentage of profits tax to net income						
28. Net income previous year						
29. Average net income prewar period						
30. Average invested capital prewar period						
31. Percentage of net income to invested capital prewar period						

Note.- Enter on the data sheet for both the appellant and the co

Prepared by _____, Resident Auditor.
Checked by _____, Date, _____
Reviewed by _____, Section Auditor.

Final profits tax
Per cent of final tax to ne
Constructed invested capita

INCOME TAX (TECHNICAL) SPECIAL ASSESSMENT SECTION

APPENDIX "B".

Comparative Statistics Data Sheet - Special Cases - 19

Nature of Business _____ Case No. _____

	Appellant	Comparative No. 1	Comparative No. 2	Comparative No. 3	Comparative No. 4	Comparative No. 5	Comparative No. 6	Average Comparatives
assets								
ss								
dness to stockholders								
nses								
(including obsolescence)								
ies								
me								
gross sales								
adjusted invested capital								
to gross sales								
ness								
o net income								
eriod								
ewar period								
invested capital prewar period								

Note.- Enter on the data sheet for both the appellant and the comparatives only statutory figures

Final profits tax _____ Appellant $ _____

Per cent of final tax to net income _____ Appellant % _____

Constructed invested capital _____ Appellant $ _____

_____, Resident Auditor.

_____, Date, _____

_____, Section Auditor.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 337.

THE WILLIAMSPORT WIRE ROPE COMPANY,

PETITIONER,

vs.

THE UNITED STATES

MOTION OF PETITIONER TO REVERSE AND REMAND.

Motion.

Comes now the petitioner, Williamsport Wire Rope Company, by its Counsel, James Walton and Clarence A. Miller, and respectfully moves that this Court reverse the judgment of the Court of Claims entered in this cause on May 2, 1927, and remand this case to that Court for hearing and determination on its merits.

Statement in Support of Motion.

In support of this motion the petitioner respectfully shows that:

1. The question presented is whether, under the provision of Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. L. 1057, 1093), providing for a special assessment and a special method of determining the war-profits and excess-profits tax rate of certain taxpayers where the application of the ordinary statutory formula provided in said Act (Sec. 301) works exceptional hardship evidenced by gross disproportion between the tax computed without the benefit of said sections and the tax computed as provided in said sections, the decision of the Commissioner of Internal Revenue as to whether the special method should be applied is final or subject to review by the Courts. (See Brief for the United States, pp. 1 and 2).

2. This question is similar to that presented in *Blair, Commissioner* v. *Oesterlein Machine Company*, No. 210, October Term, 1927. (See Brief for the United States, p. 8).

3. This Court, on November 21, 1927, *held*, in *Blair, Commissioner* v. *Oesterlein Machine Company*, No. 210, October Term, 1927, (48 S. C. Rep. 87), that the determination of the Commissioner of Internal Revenue as to whether the special method of determining the war-profits and excess-profits tax rate provided by Sec-

tions 327 and 328 of the Revenue Act of 1918 should be applied is *not* final, but may be reviewed judicially.

4. The decision of this Court in *Blair, Commissioner v. Oesterlein Machine Company*, No. 210, October Term, 1927, is determinative of the question here presented. (See Brief for the United States, p. 8).

Respectfully submitted,

James Walton,
524 Bakewell Building,
Pittsburgh, Pa.

Clarence A. Miller,
1319 F Street, N. W.,
Washington, D. C.

Counsel for Petitioner.

January 26, 1928.

Supreme Court, U. S.
FILED
APR 21 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

NO. 337

THE WILLIAMSPORT WIRE ROPE COMPANY,
Petitioner,

v.

THE UNITED STATES.

BRIEF FOR PETITIONER

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April 21, 1928.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

NO. 337

THE WILLIAMSPORT WIRE ROPE COMPANY,
Petitioner,

v.

THE UNITED STATES.

BRIEF FOR PETITIONER

I.

Preliminary Statement.

This case is before this Court by virtue of a writ of *certiorari* to the Court of Claims granted November 28, 1927 (tr. 37).

II.

Opinion of the Court of Claims.

The opinion of the Court of Claims (tr. 24) has not been officially reported, but will be found in 6 A. F. T. R. 6774.

III.

Jurisdiction of This Court.

The judgment of the Court of Claims was entered May 2, 1927 (tr. 33). The petition for writ of *certiorari* was filed June 29, 1927 (tr. 34), and granted November 28, 1927 (tr. 37).

IV.

Statement of the Case.

The facts are adequately stated in the transcript, beginning on page 1. A summary of the facts also appears in the preamble to the opinion of the learned court below, pages 24, 25 and 26.

In briefest possible form, the facts are—

That petitioner, a Pennsylvania corporation, duly filed its income and profits tax return for the calendar year 1918, which return showed a total tax liability of $306,381.77, and the tax shown thereby was paid within the time prescribed by law. The amount of the tax was in excess of 50% of the company's taxable income, but the taxpayer did not avail itself of the right granted under Section 328 (b), of paying as tax, a sum equal to 50% of its net income and petitioning for assessment under Section 328. Subsequently, the Commissioner of Internal Revenue caused an examination to be made of petitioner's books of account, and as a consequence of said examination, a number of alleged adjustments or corrections were made in petitioner's figures, the most consequential of which was an alteration in the book value of petitioner's inventories of raw material, work in process and finished

merchandise. The Commissioner, through his field revenue agents, contended that the amount of petitioner's January 1, 1918, inventory should be increased $229,326.32, and that its closing inventory on December 31, 1918, should be increased $317,178.54. Through this change in the book value of the inventories, an alleged additional tax of $89,094.85 was computed against the petitioner and, despite its protests, the amount was assessed, levied and collected on July 12, 1920. Petitioner contends that through this arbitrary adjustment of its inventories, which adjustments were carried all the way back to the year 1914, an abnormal condition was forced upon it, and it was thereby entitled to a computation of its tax under Section 328. Accordingly, on June 14, 1924, petitioner drafted and filed with the Commissioner, a claim for refund of $100,000.00, stating that the amount so claimed represented the amount by which the tax as computed by the Commissioner under Section 301 exceeded the tax when computed under Sections 327 and 328. After extended conferences and negotiations the Commissioner declined to refund and suit was thereafter duly instituted in the Court of Claims. In its petition (p. 9, tr.) taxpayer set forth a number of particulars of abnormality in both its taxable income and invested capital. On January 18, 1927, the defendant filed a special demurrer, attacking the sufficiency of the petition, and, secondly, raising the question of the jurisdiction of the court. On argument upon the demurrer on February 21, 1927, the defendant confined the issue to the question of the court's jurisdiction, and the court, in its opinion (tr. p. 24) sustained the demurrer upon the grounds of lack of jurisdiction. This was before the decision of this Court in *Blair v. Osterlein Machine Company*, No. 210, October Term, 1927. On January 26, 1928, the petitioner filed in this Court a

motion to reverse and remand on the authority of *Blair v. Osterlein Machine Company, supra.* Action on this motion was, by order of this Court of April 9, 1928, deferred until the hearing on the merits, and the case was specially set for argument April 23, 1928, after the cases heretofore assigned for that day.

V.

Question Presented.

The question presented is whether a Federal Court has jurisdiction to review the action of the Commissioner of Internal Revenue in computing or refusing to compute (the latter is the case here) a corporation's income and profits tax under the provisions of Section 327 and 328 of the Revenue Act of 1918, 40 Stat. L. 1057 96, C. 18. In other words, is the application or non-application of these two particular sections of the Revenue Act within the exclusive unreviewable discretion of the Commissioner of Internal Revenue?

VI.

The Statute.

The relevant sections of the statute are 301, 325, 326, 327 and 328. They are quoted verbatim in the transcript beginning on page 17. The essential parts thereof read:

> "Sec. 327. That in the following cases the tax shall be determined as provided in section 328:
>
> (a) Where the Commissioner is unable to determine the invested capital as provided in section 326;
>
> * * * * * * * *
>
> (d) Where upon application by the corporation the Commissioner finds and so declares of record that

the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income,

profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertain shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from time the installment was due."

* * * * * * *

The pertinent provisions of Section 145 of the Judicial Code are as follows:

The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon * * * any law of Congress * * *.

VII.

Argument.

The decision of this court in *Blair v. Oesterlein Machine Company*, No. 210, October Term 1927, 47 S. C. Rep. 87, is controlling in this case. The learned Solicitor concedes this in his brief. But the difficulty is the Court of Claims, in subsequent cases, has stated from its bench that Oesterlein does not control Williamsport nor control any other kindred cases which have since been before it. Thus it becomes appropriate to consider first, wherein the two cases differ and second, the reasons advanced by the Court of Claims in support of its opinion.

OESTERLEIN CASE COMPARED WITH WILLIAMSPORT.

The Oesterlein case was before this court upon the question of an alleged unreviewable discretionary power in the Commissioner under sections 327 and 328 as opposed to the appellate reviewing power of the United States Board of Tax Appeals. This Williamsport case, which arose before Congress created the Board, is here upon the same question of alleged unreviewable discretionary power in the Commissioner, under the same sections, as opposed to the statutory jurisdiction vested in the Court of Claims (and other Federal Courts) to try income tax cases (claims against the Government) *de novo*. In the former case, the correct amount of the tax has yet to be determined by the Board. In the latter, the entire sum imposed as alleged additional tax has per force, been paid under protest.

The Oesterlein case was argued before this court upon the theory that if the Board of Tax Appeals had power and jurisdiction to hear and determine tax questions under

sections 327 and 328, the Court of Claims and the Federal courts must have like power and jurisdiction; that such corresponding jurisdiction in the Federal Courts would mean the determination by them of the twofold question, is the taxpayer entitled to assessment under sections 327 and 328?—and what is his correct tax under those sections?— together with the further necessary jurisdiction to enter judgment for the taxpayer in the amount of any excess tax imposed upon him by the Commissioner through having wrongfully applied or denied assessment under the said sections 327 and 328;

AND THIS COURT DECIDED THE QUESTION IN THE AFFIRMATIVE.

The only possible theory upon which it might be contended that there could be jurisdiction in the Board of Tax Appeals and still no jurisdiction in the Federal courts would be that Congress vested in the Board some particular added judicial power not heretofore exercised by the courts. But the statute discloses the exact contrary. The Board has the most limited jurisdiction and merely serves to give the taxpayer an additional hearing before he is compelled to pay. Observe—

> Sec. 900 (k) Act of 1924. * * * The Board shall be an independent agency in the executive branch of the Government.

Certainly there is no added judicial power there. And observe what the Senate Finance Committee says (p. 42) in reporting the 1924 Act to the Senate—

> * * * The board is to act independently not only of the Bureau of Internal Revenue, but of the Treasury Department. The taxpayer has the opportunity of appealing to this board before paying the amount of any additional assessment if he has not had

the opportunity of being heard before the assessment was made. The contentions of both the taxpayer and the Bureau of Internal Revenue will be heard and considered and the decision of the board will be conclusive on both parties on the question of assessment.

In the event the decision is against the taxpayer, he will be required to pay the tax according to the assessment *and have recourse to the courts* for the recovery thereof. If the decision is against the Government it will likewise have recourse to the courts. • • •

The clincher of the whole thing is the manifest recognition by the Senate Committee that a section 327 and 328 case can be taken to court after a Board of Tax Appeals decision. But there has been no additional statutory jurisdiction conferred on the Courts respecting such cases. Clearly and indisputably then, there must have been the same jurisdiction in the Federal courts before the Board was created.

WHAT ARE THE OBSTACLES TO JURISDICTION WHICH THE COURT OF CLAIMS FINDS?

The learned Solicitor sets these forth at considerable length, p. 12 to 17, his brief on motion to reverse and remand. For brevity we may classify the difficulties which the Court of Claims finds into, first

"GREAT PRACTICAL DIFFICULTIES."

The same argument was advanced in Oesterlein. Learned counsel for the Commissioner laid heavily upon it. But this court said

> "But there is no inherent impossibility or, indeed, serious difficulty in reviewing judicially any determination authorized by Sections 327 and 328. The determination is to be made upon prescribed and

ascertainable data and is to conform to standards set up by the statute, all defined with such definiteness and clarity to be susceptible of judicial scrutiny."

The next difficulty of the learned court below is that by taking jurisdiction it would become necessary for the court to compute the tax and thereby

ENCROACH ON THE EXCLUSIVE PREROGATIVES OF THE COMMISSIONER.

Of course the court must compute the correct tax. That is what the court does and has been doing in every one of the tens of thousands of tax cases. Why? Because that is the indispensable prerequisite to the determination of the amount of a taxpayer's judgment for refund. It is true that counsel generally stipulate and thus relieve the court of this burden. But without stipulation, the court must compute the correct tax in every case where overpayment is contended by the taxpayer. In *U. S. v. Emery*, 237 U. S. 28 and *Rock Island R. R. v. U. S.*, 254 U. S. 141, this court stated, in substance, that it was the Commissioner's duty to determine, assess and levy the tax, but that does not mean that a Federal court may not compute the tax correctly when the Commissioner refuses to do it. To say that a court is without jurisdiction to compute and determine the correct tax is simply to say, in effect, that a court is without jurisdiction to render a judgment for a refund.

The next obstacle stated by the court below is—

"Plaintiff did not, in the beginning, question the amount of taxes it should pay. • • • No complaint was lodged against the exaction until additional taxes were assessed and demanded.

Then for the first time the plaintiff insists upon its alleged right to special assessment."

It is not surprising that a court, heavily burdened with tax litigation, should now find it hard to understand that any taxpayer would be so credulous as to believe that if the initial payment of its tax were excessive, the amount of the excess would be voluntarily refunded by the Commissioner; a taxpayer who would take that risk rather than engage in a controversy with his government during a time of national peril. This petitioner confesses it did so. Moreover, no claim for assessment under sections 327 and 328 would ever have been made if the Commissioner had left the company unmolested. But what has that to do with the question of jurisdiction?

Another difficulty of the lower court is stated, (p. 31, tr.)

"THE PLAINTIFF, IN OUR VIEW OF THE CASE, HAS MISTAKEN THE REMEDY."

It is well settled that there can be no remedy by mandamus. It is similarly definitely settled that it cannot be by injunction to restrain the Collector (*Graham v. du Pont*, 262 U. S., 234).

If there is any possible way to test the legality or correctness of the amount of an income tax exaction other than to pay the tax and sue to recover, what can it be?

The learned court below states another difficulty—

> "We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder * * *. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due."

The error here arises from assuming that the law provides for two distinct and different taxes,—one under

section 391 and the other under 327 and 328. But the fact is there is only one tax, and that is the correct tax, which may be under either of the sections, according to the circumstances. In our complaint, which for the purpose of demurrer must be taken as true, we have alleged the imposition by the Commissioner of an incorrect excessive tax, the payment thereof, a refund filed and rejected. No matter how burdensome it might be to hear our case (which it will not be at all) and no matter what formula, method or line of reasoning the Commissioner employed in his computations, the jurisdiction is unaffected and the question remains, *has the petitioner been forced to pay an excessively illegal tax under the law?*

SOLICITOR GENERAL FULLY WARRANTED.

The action of the learned Solicitor in conceding that this case is controlled by Oesterlein is abundantly warranted and merits the commendation of this court.

VIII.

Conclusion.

It is respectfully submitted that the judgment of the Court of Claims should be reversed and the case remanded for hearing and determination on its merits.

Respectfully submitted,

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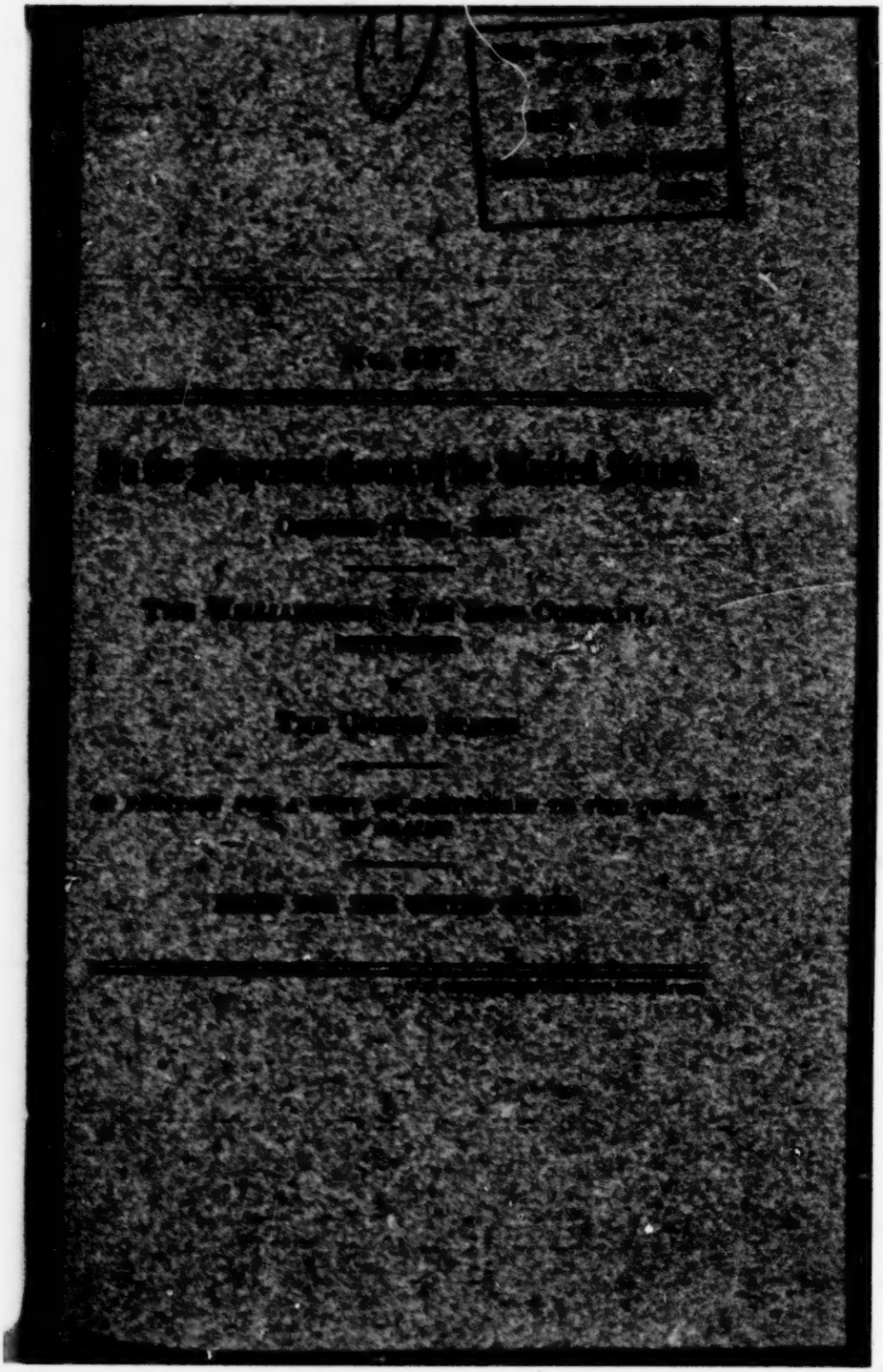
April 21, 1928.



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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 337

THE WILLIAMSPORT WIRE ROPE COMPANY, petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims has not yet been officially reported, but will be found at page 24 of the Record.

JURISDICTION

The judgment of the Court of Claims was entered May 2, 1927. (R. 33.) The petition for writ of certiorari was filed June 29, 1927 (R. 32), under the provisions of the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether, under the provisions of Sections 327 and 328 of the Revenue

Act of 1918, providing for a special assessment and a special method of determining the war-profits and excess-profits tax base of certain taxpayers where the application of the ordinary statutory formula provided in said Act (Sec. 301) works exceptional hardship evidenced by gross disproportion between the tax computed without the benefit of said sections and the tax so computed, the decision of the Commissioner of Internal Revenue as to whether the special method should be granted or final or subject to review by the courts.

THE STATUTES

Sections 327 and 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1061, provide:

> SEC. 327. That in the following cases the tax shall be determined as provided in section 328:
>
> (a) Where the Commissioner is unable to determine the invested capital as provided in section 326;
>
> (b) In the case of a foreign corporation;
>
> (c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;
>
> (d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined

without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax computed without benefit of this section is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid

shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(e) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress without regard to the restrictions contained in section 257.

STATEMENT

The petitioner on June 15, 1919, filed with the proper officer its return of income for the year 1918. (R. 7.) The tax liability shown by the return was duly paid. (R. 7.) Subsequently, as a result of an examination of petitioner's books, the Commissioner of Internal Revenue levied an additional assessment against the petitioner, which was paid. (R. 7, 8.)

Petitioner duly filed a claim for refund, claiming that it had a right to have its tax liability computed in accordance with Sections 327 and 328 of the Revenue Act of 1918, and was entitled to a refund of the amount by which the liability computed

under Section 301 exceeded the liability computed under Sections 327 and 328. (R. 9, 12.)

Six months having elapsed since the date of the filing of the claim for refund without any action having been taken thereon by the Commissioner of Internal Revenue (R. 13), this suit was brought.

Petitioner alleged in its petition below facts tending to qualify it under Section 327 for the special assessment outlined in Section 328. (R. 9, 12.)

The petition in the Court of Claims set forth two causes of action, the first based on the above facts, the second on other grounds. To the first cause of action the respondent demurred (R. 24), and the Court of Claims sustained the demurrer and dismissed the petition as to that item. (R. 33.)

The second cause of action has been conceded by the respondent, refund has been made, and petitioner has filed a motion to dismiss that cause of action in the Court of Claims; only the first cause of action is involved in the present application for certiorari.

ARGUMENT

It is the contention of the United States that Sections 327 and 328 of the Revenue Act of 1918, by reason of the expressions used and the nature of the subject matter dealt with, contemplated that the granting of relief to taxpayers in the form of special assessment under these sections was a matter entrusted to the discretion of the Commissioner of Internal Revenue, the only check on the exercise

of that discretion being the requirement that he should make his determination a matter of record and should, when called upon to do so, report to Congress the cases in which he had applied the special assessment provision. Looking at Sections 327 and 328, the conclusion is almost irresistible that it was the intention to entrust the decision to the Commissioner and make his decisions final. Section 327 (a) provides that the tax shall be determined under Section 328 "where the Commissioner is unable to determine the invested capital." Subdivision (c) provides that Section 328 shall be applied if "the Commissioner is unable satisfactorily to determine the respective values of the several classes of property," etc. Subdivision (d) provides that the special assessment allowed in Section 328 may be applied where, upon application by the corporation, "the Commissioner finds and so declares of record" that the tax, if determined without the benefit of this section, would work exceptional hardship, evidenced by gross disproportion between the tax computed without the benefit of the section and the tax computed by reference to the representative corporations specified in Section 328. These provisions, fairly construed, indicate that it must be the Commissioner who is unable to determine invested capital, as provided in Section 326, and it must be the Commissioner who is unable satisfactorily to himself to determine the various things provided for in Subdivision (c) of Section 327, and it must be the Commissioner

who finds and so declares of record that hardship would otherwise result, before special assessment shall be granted.

It is our belief that the decision of the Court of Claims dismissing the cause of action is sound. However, the case of *Blair, Commissioner*, v. *Oesterlein Machine Company*, No. 210, October Term, 1927, which was decided adversely to the Government in the Court of Appeals of the District of Columbia, is now pending before this Court on writ of certiorari granted May 2, 1927, and presents a question similar to that presented in this case and arising out of the same sections of the Revenue Act of 1918. The decision of this Court in that case will almost surely also determine the question here presented. Under these circumstances we believe that we would not be justified in opposing the petition for writ of certiorari.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
GEORGE H. FOSTER,
Attorney.

SEPTEMBER, 1927.

○

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It is our belief that the decision of the Court of Claims dismissing the cause of action is sound. However, the case of *Blair, Commissioner*, v. *Oesterlein Machine Company*, No. 210, October Term, 1927, which was decided adversely to the Government in the Court of Appeals of the District of Columbia, is now pending before this Court on writ of certiorari granted May 2, 1927, and presents a question similar to that presented in this case and arising out of the same sections of the Revenue Act of 1918. The decision of this Court in that case will almost surely also determine the question here presented. Under these circumstances we believe that we would not be justified in opposing the petition for writ of certiorari.

WILLIAM D. MITCHELL,
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SEPTEMBER, 1927.

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In the Supreme Court of the United States

OCTOBER, 1927

No. 357

THE WILLIAMSPORT WIRE ROPE COMPANY, PETITIONER

v.

THE UNITED STATES

ON MOTION OF THE PETITIONER TO REVERSE AND REMAND

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 24) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered May 2, 1927. (R. 33.) The petition for writ of certiorari was filed June 29, 1927 (R. 32), and the writ was granted November 28, 1927, without opposition from the United States.

QUESTION PRESENTED

In *Blair, Commissioner, v. Oesterlein Machine Co.*, No. 210, October Term, 1927, decided November

21, 1927, this Court held that the decision of the Commissioner of Internal Revenue as to whether a taxpayer was entitled to special assessment under Sections 327 and 328 of the Revenue Act of 1918, and as to the amount of the tax computed under those sections, is not conclusive on the Board of Tax Appeals and the Board may determine for itself, from evidence before it, whether the taxpayer was entitled to the benefit of the special assessment provisions, and, if so, the amount of the tax.

The question presented here is whether the same principle applies in suits in the Court of Claims to recover taxes alleged to have been illegally assessed and collected, and whether the Court of Claims may determine from evidence before it, whether the taxpayer was entitled to special assessment, and, if so, what the correct amount of the tax is, and then render judgment for the taxpayer for the difference between the amount paid and the correct amount of the tax as determined by the court.

THE STATUTES

Sections 327 and 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, provide:

> SEC. 327. That in the following cases the tax shall be determined as provided in section 328:
>
> (a) Where the Commissioner is unable to determine the invested capital as provided in section 326;
>
> (b) In the case of a foreign corporation:

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which

bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of

such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress without regard to the restrictions contained in section 257.

STATEMENT

The petitioner, on June 15, 1919, filed its income-tax return for 1918, and paid a tax accordingly. (R. 7.) Subsequently, the Commissioner of Internal Revenue levied an additional assessment,

which was paid. (R. 7 and 8.) The petitioner duly filed a claim for refund, claiming it had a right to have its tax liability computed in accordance with Sections 327 and 328 of the Revenue Act of 1919, and was entitled to a refund of the amount by which the tax actually assessed and paid exceeded the tax computed under Sections 327 and 328. (R. 9–12.) Six months having elapsed from the date of filing the claim without action taken by the Commissioner (R. 13) this suit was brought. The petitioner alleged in its petition facts tending to show that the conditions existed which entitled it to special assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918. It alleged that the tax it had paid exceeded the true tax computed under Sections 327 and 328 in the sum of $100,000 (R. 12) and asked judgment for that amount (R. 15). Another cause of action was set up in the petition, but the United States has conceded that claim and refund has been made, and only the first cause of action is now involved. The United States demurred (R. 23), and the demurrer was sustained (R. 24). The decision of the Court of Claims was rendered before that in *Blair v. Oesterlein Machine Co.* The Court of Claims said (R. 30):

> The court is manifestly without authority to compute a tax under Sections 327 and 328 of the Revenue law. The Commissioner has refused to apply the sections as requested, and we have no means to compel him to do

so. Sections 327 and 328 of the statute point out the method to be pursued by the Commissioner in applying special assessment. In his office and available to him, are the facts, the records, voluminous and important, upon which the Commissioner relies in making comparisons with representative corporations engaged in a like trade or business, and upon no possible hypothesis has the court any means of knowing, in the absence of an official computation by the Commissioner, what the amount of plaintiff's tax would be under the conditions set forth in the law. Until the Commissioner has acted, and the record of his actions is before the court, we are powerless to determine that he should have done something which under the law he positively refuses to do.

The Court of Claims also said (R. 32):

In addition to what has been said, the provisions of the revenue law authorizing special assessment confer upon the Commissioner discretionary power. He is vested by Congress with the right to determine from the facts of each case when the abnormal conditions obtain to warrant the application of the law, which by its very terms indicates that only in exceptional cases is he to resort thereto. The plaintiff does not question the authority of Congress to confer the jurisdiction upon the commissioner, and does not challenge in the petition his good faith or charge abuse of discretion in refusing it classification under the special assessment sections. Plaintiff did not in the beginning

question the amount of taxes it should pay, the return made by it, and the taxes due as per the same were voluntarily paid. No complaint was lodged against the exaction until additional taxes were assessed and demanded. Then for the first time the plaintiff insists upon its alleged right to special assessment. Then and only then was the commissioner acquainted with its allegations of an abnormal status and the many unusual factors which prevented him from ascertaining invested capital under Section 326. The presumption is that the Commissioner discharged his duty under the law. In the absence of any information to the contrary, we may not presume that the Commissioner found the statutory difficulties which precluded an assessment under Section 301. On the contrary, his inaction indicates that no such difficulties were encountered. We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder, and a refund asked and refused. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due. *Louisiana* v. *McAdoo*, 234 U. S. 627; *United States* v. *Babcock*, 250 U. S. 328; *Ray Consolidated Copper Co.* v. *United States*, 268 U. S. 373.

ARGUMENT

The rules of this Court contemplate motions to dismiss or affirm, but a motion to reverse and re-

mand, without giving the successful party in the lower court an opportunity to argue his case according to the rules, is a novelty. Because of the peculiar situation attending this case, we are glad to consent to having the case submitted on briefs in this way and finally disposed of, because the decision as to whether this case is controlled by *Blair* v. *Oesterlein Machine Co.* may finally dispose of it.

In the *Oesterlein Machine Co. case* the Court held that the decision of the Commissioner as to whether a taxpayer was entitled to special assessment and his decision as to the amount of the tax when computed under the special assessment provisions are not final and are subject to review by the Board of Tax Appeals, and that the Board may determine for itself whether the facts require special assessment under Sections 327 and 328 of the Revenue Act of 1918, and the Board may also determine for itself the correct amount of the tax when computed under those sections. The United States argued that case on the theory that if the Board of Tax Appeals had power to determine these questions for itself, the Court of Claims or a United States District Court sitting as a Court of Claims has like power, and in exercising jurisdiction over suits to recover taxes alleged to have been illegally assessed and collected may determine whether the taxpayer was entitled to special assessment, and if so, the right amount of the tax resulting from the application of the special assessment provisions, and grant judgment to the taxpayer for

the difference between the amount he has paid and the correct amount of tax determined in that way, if he has overpaid his true tax. It was argued by the United States in that case that the decision of the Commissioner was intended by Congress to be final because of the great practical difficulties which the Board of Tax Appeals and other judicial tribunals are confronted with if required to apply the special assessment provisions. The Court said:

> But there is no inherent impossibility or, indeed, serious difficulty in reviewing judicially any determination authorized by sections 327 and 328. The determination is to be made upon prescribed and ascertainable data and is to conform to standards set up by the statute, all defined with sufficient definiteness and clarity to be susceptible of judicial scrutiny. We can not assume that it is to be either arbitrary or unrelated to the appropriate data in the Commissioner's office, or that he is more qualified to make it than the Board established to review his decisions. An examination of the sections creating the Board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character. Not only is it required by section 900 (e) to hear and determine appeals taken under section 274, which in terms allows an appeal in every case where a deficiency is found by the Commissioner, but it is empowered to administer oaths and to compel the attendance of witnesses and the production of documents and records. It

> may investigate anew the issues between the government and the taxpayer and upon the determination of the appeal it may affirm, set aside or modify the findings and decision of the Commissioner.

As we read the decision it disposes of both grounds on which the Court of Claims based its decision in the case at bar.

The Court of Claims, however, does not take that view. Its attitude has been disclosed in other similar cases pending before it. It concedes that this Court has disposed of the contention that the decision of the Commissioner of Internal Revenue is final and not reviewable, but it adheres to the view that under the statutes defining its jurisdiction the Court of Claims has no power to determine the amount of the tax under Sections 327 and 328.

We believe that as a result of the decision in *Blair* v. *Oesterlein Machine Co.*, the Court of Claims, when entertaining jurisdiction of a suit to recover taxes claimed to have been illegally or erroneously assessed, may determine for itself whether the taxpayer was entitled to special assessment, and if it concludes that he was, it may proceed to ascertain and determine the true amount of the tax computed as directed in Sections 327 and 328, and, if it appears that the tax actually paid exceeds the correct tax which the taxpayer should have been required to pay, it may award him judgment for the difference; that in passing on these matters the

Court of Claims may require the Commissioner of Internal Revenue to disclose all information in his possession, bearing on these questions, and the taxpayer may also offer evidence as in other cases, the burden being on the taxpayer to prove conditions and facts which entitle him to special assessment, and to furnish to the Court of Claims the evidence necessary to determine the true tax according to the method provided in Section 328.

We appreciate the difficulties confronting the Court of Claims, resulting from the vagueness of the formulae prescribed in Sections 327 and 328, and the character of the evidence, requiring an examination of the returns of large numbers of taxpayers in the same business, but those are matters which were presented in the *Osborne Machine Company* case and seem to have been disposed of.

Since the Court of Claims takes the view that it does of its powers and jurisdiction in these matters, it is desirable that this case be submitted for an expression of opinion by this Court on these questions. The views of the Court of Claims are clearly set forth in its opinion in this case. In order to be sure that this Court has before it a complete statement of the position taken by the Court of Claims, we present what we believe to be a fair summary of the views of the Court of Claims, as follows:

SUMMARY OF THE VIEWS OF THE COURT OF CLAIMS

The Court of Claims has no jurisdiction of tax cases as such. The Court's jurisdiction arises

under Section 145 of the Judicial Code, which authorizes a money judgment against the United States for an illegal exaction of money under a law of Congress. The Court has no power or authority over the *acts* of the Commissioner, can not control what he shall or shall not do, may not remand cases for action, either original or corrective. *Medbury v. United States*, 173 U. S. 492; *Newcomber v. United States*, 51 C. Cls. 408.

Every case heretofore involving jurisdiction of a claim arising under an Act of Congress under Section 145 of the Code clearly discloses authority of the officer to act and his erroneous application of the facts to the statute authorizing the action. *Newcomber Case, supra.*

In revenue cases the *Rock Island case*, 254 U. S. 141, points out the necessary steps to be taken before our jurisdiction attaches. The revenue law imposes the taxes, the Commissioner assesses and levies the same. The Commissioner predicates his right to the exaction under a specified section of the law. With the facts before him he proceeds under that section of the law and makes the levy. The taxpayer contests the legality of his action, pays the tax, applies for a refund; a refund is refused. Undoubtedly under the applicable sections of the law, viz, Sections 3220-3226, R. S., this Court has jurisdiction, if not barred by limitations, to pass upon the case and either award a money judgment for the

sum illegally exacted under the section of the revenue law under which the tax was levied or dismiss the petition. *Rock Island case, supra.*

If the plaintiff in this case was seeking a judgment under the facts above stated, the court has jurisdiction to proceed to judgment. The plaintiff does not seek a judgment for $383,083.53, the amount of the tax levied and paid under Section 301 of the Revenue Act of 1918; nor does he assert that if that section is applicable the tax is illegally assessed. No claim is made for the whole or any portion of the tax paid under Section 301 if that section has been correctly applied by the Commissioner. If such a claim appeared in the allegation of the petition we have jurisdiction.

Plaintiff does not assert that he is not liable for income, excess-profits, and war taxes under the revenue law. The complaint is directed toward a failure of the Commissioner, as well as a refusal, to assess his taxes under Sections 327 and 328 of the Revenue Act of 1918. The Commissioner declined to assess the taxes involved under Sections 327 and 328, *supra;* therefore, under this petition there is before the Court the single issue, i. e., was the plaintiff liable for the taxes at issue under Section 301? If not, plaintiff is entitled to a judgment for $383,083.53, with interest thereon. Either that sum, or the petition be dismissed. The Court of Claims in so holding might affirmatively say that Sections 327

and 328 were the sections of the law under which the levy should have been made; but it is assuredly without power to force the Commissioner to proceed under those sections or to ascertain the amount of the tax due thereunder.

The vital distinction lies in the fact that the plaintiff is not asking the Court to do any of the things set forth above. What the petition asks the Court to do is to first find that under Section 301 the taxes were illegally exacted; that they should have been levied under Sections 327 and 328. The Court must then find what the amount of the tax would be under Sections 327 and 328 and award judgment for the plaintiff. In other words, the Court's opinion is sought as to whether the plaintiff's liability for taxes is to be increased or diminished—not upon what the Commissioner has done, but upon what he refuses to do.

Sections 327 and 328 provide what the Commissioner shall do in making special assessments, i. e., aside from his discretionary authority to apply the law.

1. "The amount of the tax shall be the amount which bears the same ratio to the net income of the taxpayer * * * for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income * * * for such year."

2. The Commissioner in making the comparison is limited to representative corporations whose invested capital can be satisfactorily determined under Section 326, and whose gross income, net income, profits per unit of business transacted, etc., are similar from point of situation.

If the jurisdiction of the Court of Claims extends to the adjudication of the issue presented in this case and the Court should determine that the plaintiff was illegally assessed under Section 301, and Sections 327 and 328 are applicable, it then becomes the duty of the Court to ascertain the amount of the tax due under special assessment so that one may be set off against the other. That is precisely what the Court is asked to do.

By what process may this be done? The Commissioner has not made a record of facts for which the Court may issue a call under Section 164 of the Judicial Code. The Commissioner refused to do so. The record of proceedings in the Commissioner's office is not in dispute. The facts upon which he acted are available. Therefore, the only remaining resource of the Court, if special assessment is to obtain, is to issue a call for the returns made by such representative corporations as set forth in No. 2 above. The Court has authority to issue the call; but under the same section which confers the authority is the reserved right of the head of any department to refuse compliance therewith "when, in his opinion, such compliance would

be injurious to the public interest." If the head of the Department refuses, the Court is without authority to enforce compliance.

Section 257 of the Revenue Act manifestly furnishes a substantial cause for refusal.

If it should be urged that under the *Oesterlein Case* the Court may issue a subpœna *duces tecum* for the papers, the reply is that this would be the equivalent of nullifying the reservation in Section 164 of the Code and enable the Court to do indirectly what it may not do directly. If the Court may do this in a tax case, it may be done in every case of refusal, and thereby defeat the evident purpose of the reservation.

Granting, *arguendo*, the authority of the Court to obtain the files of the Commissioner with respect to representative corporations, what follows? The Court is then put in the situation where the law places the Commissioner, and instead of ascertaining whether the Commissioner has or has not correctly applied existing facts to a law of Congress, the Court, as an original proposition, assesses the tax, ascertains the difference, and renders a judgment in accord with its opinion. In other words, the Court assesses and levies the tax. The Court's jurisdiction in tax cases was stated in *United States v. Emery*, 237 U. S. 28. This case, followed by the *Rock Island Case*, 254 U. S. 141, points out the preliminary steps to be taken by a taxpayer before he may sue in this Court.

Obviously the preliminary proceedings as to Sections 327 and 328 have not been observed. The plaintiff has mistaken his forum, the Board of Tax Appeals, and the right of review accorded in the Act creating the Board.

The foregoing statement is a fairly complete statement of the lower court's reasoning.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

FEBRUARY, 1928.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 337

THE WILLIAMSPORT WIRE ROPE COMPANY, Petitioner

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 24) is reported in 63 C. Cls. 463.

JURISDICTION

The judgment of the Court of Claims was entered May 2, 1927. (R. 33.) The petition for writ of certiorari was filed June 29, 1927 (R. 32), and the writ was granted November 28, 1927 (R. 34), without opposition from the United States.

QUESTION PRESENTED

In *Blair, Commissioner,* v. *Oesterlein Machine Co.*, No. 210, October Term, 1927, decided November 21, 1927, this Court held that the decision of the Commissioner of Internal Revenue as to whether a taxpayer was entitled to special assessment under Sections 327 and 328 of the Revenue Act of 1918, and as to the amount of the tax computed under those sections, is not conclusive on the Board of Tax Appeals, and the Board may determine for itself, from evidence before it, whether the taxpayer was entitled to the benefit of the special assessment provisions, and, if so, the amount of the tax.

The question presented here is whether the same principle applies in suits in the Court of Claims to recover taxes alleged to have been illegally assessed and collected, and whether the Court of Claims may determine from evidence before it, whether the taxpayer was entitled to special assessment, and, if so, what the correct amount of the tax is, and then render judgment for the taxpayer for the difference between the amount paid and the correct amount of the tax as determined by the court.

THE STATUTES

Sections 327 and 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1093, provide:

> SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a

Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

The jurisdiction of the Board of Tax Appeals was stated in the Revenue Act of 1924, Section 900 (c. 234, 43 Stat. 253, 336, 337; U. S. C., Title 26, Secs. 1211, 1216), as follows:

> (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.
>
> * * * * *
>
> (e) The Board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312.

Section 274 (43 Stat. 297; U. S. C., Title 26, Secs. 1048, 1049) reads as follows:

> (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.
>
> (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the

> amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

Sections 1001 to 1005 of the Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 109–111; U. S. C. App., Title 26, Secs. 1224–1228) provide for review of the decisions of the Board of Tax Appeals by a Circuit Court of Appeals or by the Court of Appeals of the District of Columbia.

The pertinent provisions of Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250) are as follows:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims (except for pensions) founded upon * * * any law of Congress * * *.

The pertinent provisions of Section 24 of the Judicial Code, as amended by the Act of February 24, 1925, c. 309, 43 Stat. 972 (U. S. C., Title 28,

Sec. 41, par. 20), relating to the jurisdiction of the District Courts are:

> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon * * * any law of Congress * * *.
>
> Concurrent with the Court of Claims of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.

Reference to the power of the Court of Claims to render judgment for any internal-revenue tax erroneously or illegally assessed or collected is found also in Section 1020 of the Revenue Act of 1924 (U. S. C. Title 28, Sec. 284), which reads as follows:

> Section 177 of the Judicial Code, as amended, is reenacted without change, as follows:
>
> "SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of

judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or any sum which was excessive or in any manner wrongfully collected, under the internal revenue laws."

STATEMENT

The petitioner, on June 15, 1919, filed its income tax return for 1918, and paid a tax accordingly. (R. 7.) Subsequently, the Commissioner of Internal Revenue levied an additional assessment, which was paid. (R. 7 and 8.) The petitioner duly filed a claim for refund, claiming it had a right to have its tax liability computed in accordance with Sections 327 and 328 of the Revenue Act of 1919, and was entitled to a refund of the amount by which the tax actually assessed and paid exceeded the tax computed under Sections 327 and 328. (R. 9–12.) Six months having elapsed from the date of filing the claim without action taken by the Commissioner (R. 13), this suit was brought. The petitioner alleged in its petition facts tending to show that the conditions existed which entitled it to special assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918. It alleged that the tax it had paid exceeded the true

tax computed under Sections 327 and 328 in the sum of $100,000 (R. 12) and asked judgment for that amount (R. 15). Another cause of action was set up in the petition, but the United States has conceded that claim and refund has been made, and only the first cause of action is now involved. The United States demurred (R. 23), and the demurrer was sustained (R. 24). The decision of the Court of Claims was rendered before that in *Blair* v. *Oesterlein Machine Co.* The Court of Claims said (R. 30):

> The court is manifestly without authority to compute a tax under Sections 327 and 328 of the Revenue law. The Commissioner has refused to apply the sections as requested, and we have no means to compel him to do so. Sections 327 and 328 of the statute point out the method to be pursued by the Commissioner in applying special assessment. In his office and available to him, are the facts, the records, voluminous and important, upon which the Commissioner relies in making comparisons with representative corporations engaged in a like trade or business, and upon no possible hypothesis has the court any means of knowing, in the absence of an official computation by the Commissioner, what the amount of plaintiff's tax would be under the conditions set forth in the law. Until the Commissioner has acted, and the record of his actions is before the court, we are powerless to determine that he should have done something which under the law he positively refuses to do.

The Court of Claims also said (R. 32):

> In addition to what has been said, the provisions of the revenue law authorizing special assessment confer upon the Commissioner discretionary power. He is vested by Congress with the right to determine from the facts of each case when the abnormal conditions obtain to warrant the application of the law, which by its very terms indicates that only in exceptional cases is he to resort thereto. The plaintiff does not question the authority of Congress to confer the jurisdiction upon the commissioner, and does not challenge in the petition his good faith or charge abuse of discretion in refusing it classification under the special assessment sections. Plaintiff did not in the beginning question the amount of taxes it should pay, the return made by it, and the taxes due as per the same were voluntarily paid. No complaint was lodged against the exaction until additional taxes were assessed and demanded. Then for the first time the plaintiff insists upon its alleged right to special assessment. Then and only then was the commissioner acquainted with its allegations of an abnormal status and the many unusual factors which prevented him from ascertaining invested capital under Section 326. The presumption is that the Commissioner discharged his duty under the law. In the absence of any information to the contrary, we may not presume that the Commissioner found the statutory difficulties which precluded an assessment under Section 301. On

the contrary, his inaction indicates that no such difficulties were encountered. We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder, and a refund asked and refused. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due. *Louisiana* v. *McAdoo*, 234 U. S. 627; *United States* v. *Babcock*, 250 U. S. 328; *Ray Consolidated Copper Co.* v. *United States*, 268 U. S. 373.

A motion by the petitioner to reverse was deferred until the argument.

SUMMARY OF ARGUMENT

In *Blair, Commissioner* v. *Oesterlein Machine Co.*, decided November 21, 1927, it was held that the statutes giving the Board of Tax Appeals authority to review decisions of the Commissioner of Internal Revenue on determination of deficiencies were not subject to the limitation that the decisions of the Commissioner, making or refusing special assessments under Sections 327 and 328 of the Revenue Act of 1918, were not open to review.

The question here is whether the statutes giving to the Court of Claims jurisdiction to entertain suits to recover taxes erroneously or illegally assessed or collected, read in connection with Sections 327 and 328 of the Revenue Act of 1918, deny to the court the power to review the decisions of the Commissioner under those sections. We have been un-

able to find any ground for contending that the cases are distinguishable. If the statute giving the Board of Tax Appeals general jurisdiction to review the decisions of the Commissioner on deficiencies was not subject to any qualification as to special assessments, we see no reason why the general jurisdiction of the Court of Claims to award judgment for taxes illegally or erroneously assessed or collected should be so limited. At present the decisions of the Board of Tax Appeals are reviewable in the Circuit Court of Appeals. If the decisions of the Commissioner under the special assessment sections are reviewable in the courts under that procedure, we see no reason why they should not be reviewable in the courts where the other course is followed and suit is commenced in the District Court or in the Court of Claims, for the collection of the tax alleged to have been erroneously assessed.

Notwithstanding the decision in *Blair* v. *Oesterlein Machine Company*, the Court of Claims adheres to the view that it has no jurisdiction in these special assessment cases, and it is necessary to submit the matter for the decision of this Court. The contentions of the Court of Claims are stated in this brief. The principal point seems to be that the Court of Claims can not grant relief in such cases, because the determination of the true tax under Sections 327 and 328 involves an assessment of the tax. The Court of Claims also contends that its jurisdiction to award recovery for taxes illegally collected is limited to cases where the correct see-

tion of the Revenue Act has been applied by the Commissioner, but erroneously applied, and that where, as in this case, the Commissioner has applied Section 301, which prescribes the general formula, and has refused to apply the special assessment sections, the Court of Claims may not itself determine what the true tax should have been under the special assessment sections.

ARGUMENT

In the *Oesterlein Machine Company case*, No. 210, October Term, 1927, decided November 21, 1927, this Court held that the decision of the Commissioner as to whether a taxpayer was entitled to special assessment and also his decision as to the amount of the tax when computed under the special assessment provisions are not final, and are subject to review by the Board of Tax Appeals, and that the Board may determine for itself whether the facts require special assessment under Sections 327 and 328 of the Revenue Act of 1918, and the Board may also determine for itself the correct amount of the tax when computed under those sections. The statutes defining the jurisdiction of the Board of Tax Appeals under consideration in the *Oesterlein Machine Company case* gave to the Board jurisdiction to review the decisions of the Commissioner determining deficiencies—that is, determining that the amount of tax paid was less than that owing to the United States. The statute conferring that jurisdiction contained no limitation on the

power of the Board to examine any questions of fact or of law involved in such appeals. The United States contended that the statute conferring jurisdiction should be construed in connection with certain provisions in Section 327 and 328 of the Revenue Act of 1918, which seemed to leave to the Commissioner of Internal Revenue the duty of exercising his own judgment to determine whether the ordinary formula for computing taxes could be satisfactorily applied and whether its application worked an exceptional hardship on the taxpayer as compared with "representative corporations" engaged in the same line of business. It was contended that the special assessment provisions contained words indicating that the Commissioner was to exercise his own personal judgment in these matters, and it was argued that Congress intended his judgment to be final, since the special assessment provisions were intended merely to grant relief to taxpayers from hardship, and that this argument was supported by the vagueness of the formula in Sections 327 and 328 and the difficulty which judicial tribunals would have in applying them. The Court rejected this contention and held that the matters dealt with in Sections 327 and 328 of the Revenue Act of 1918 could be reviewed judicially, and refused to read into the statute conferring jurisdiction on the Board of Tax Appeals

> an exception based on the supposedly sacrosanct character of his determinations under §§ 327 and 328.

If the statute conferring such jurisdiction on the Board of Tax Appeals is not subject to have read into it any such limitation by reason of anything contained in Sections 327 and 328 of the Revenue Act of 1918, we see no ground on which to contend that any such limitation should be read into the statutes conferring jurisdiction on the Court of Claims and on the United States District Courts sitting as courts of claims.

The jurisdiction of the Court of Claims to entertain suits by taxpayers to recover taxes erroneously or illegally assessed is based on that provision in Section 145 of the Judicial Code which gave the court jurisdiction of claims founded on Acts of Congress. *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28; *Rock Island, &c., Railroad Company* v. *United States*, 254 U. S. 141. That the jurisdiction of the court extends to entertaining suits for the recovery of and awarding of judgment for taxes "erroneously or illegally assessed or collected" has been expressly recognized by several statutes. Section 3226 of the Revised Statutes, as amended (U. S. C., Title 26, Section 156), provides that—

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected,

until a claim for refund has been filed with the Commissioner.

The amendments to Section 177 of the Judicial Code, relating to interest on judgment in the Court of Claims made by the Revenue Act of 1924, provide that—

> interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal revenue tax erroneously or illegally assessed or collected.

The provision in Section 24 of the Judicial Code, relating to the jurisdiction of the United States District Courts, states expressly that they shall have jurisdiction—

> concurrent with the Court of Claims of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected.

The statutes relating to the jurisdiction of the Court of Claims should therefore be read as if they expressly granted jurisdiction to entertain suits and award judgment for the recovery of internal revenue taxes "erroneously or illegally assessed or collected."

This suit is for the recovery of a tax which has been paid and which, it is claimed, was erroneously and illegally assessed and collected. It was claimed that it was illegally and erroneously assessed and collected because the Commissioner applied the or-

dinary formula prescribed for computing the tax contained in Section 301 when, because of the peculiar conditions affecting this taxpayer, he was entitled to have his tax assessed under the provisions of Sections 327 and 328, relating to special assessments.

If, as held in the *Oesterlein Machine Company case*, the decisions of the Commissioner refusing to apply the special assessment provisions, on the ground that the conditions did not call for such application, are not final and are subject to judicial review, then the Court of Claims has imposed upon it the task of determining whether the special assessment provisions should have been applied, because such a determination is necessary in ascertaining whether the tax which has been paid was illegally or erroneously assessed or collected. In every case in the Court of Claims for recovery of a tax alleged to have been erroneously or illegally assessed or collected the court determines what amounts has been paid and what should have been paid as the true tax imposed by law, and if the amount paid exceeds that which the court determines should have been paid it awards judgment for the difference.

A taxpayer dissatisfied with the decision of the Commissioner has the choice of taking an appeal to the Board of Tax Appeals or of paying the tax fixed by the Commissioner and bringing a suit against the United States in the Court of Claims or in the United States District Courts to recover

the amount alleged to have been erroneously or illegally assessed or collected.

Since the Revenue Act of 1926 was passed the decisions of the Board of Tax Appeals are reviewable, on the petition of either the Commissioner or the taxpayer, by Circuit Courts of Appeals or by the Court of Appeals of the District of Columbia, whose decisions, in turn, may be reviewed by this Court on certiorari, so that under the decision in the *Oesterlein Machine Company case* the decisions of the Commissioner as to whether the special assessment provisions should have been applied, and if applied what the resulting tax is, are reviewable in the courts, where the route through the Board of Tax Appeals is followed. Under the decision of the Court of Claims in this case, if, instead of taking an appeal to the Board of Tax Appeals, the taxpayer pays the tax and brings a suit in the Court of Claims or in the United States District Courts to recover the amount illegally collected, the selection of that judicial route results in preventing review in the courts of such decisions of the Commissioner, at least in so far as they refuse to apply the special assessment provisions.

Since the Court of Claims takes the view that it does of its powers and jurisdiction in these matters, it is necessary that this case be submitted for an expression of opinion by this Court.

One hundred and seventy-seven of these special assessment cases have recently been commenced and are now pending in the Court of Claims.

Others are pending in the United States District Courts. Confession of error by the United States in this one would establish no precedent to govern the Court of Claims in the others, and proper deference to the views of that court requires, in any event, that the matter be disposed of here. The views of the Court of Claims are clearly set forth in its opinion in this case. (R. 24.)

In order to be sure that this Court has before it a complete statement of the position taken by the Court of Claims we supplement the opinion with what we believe to be a fair summary of the lower court's views as follows:

SUMMARY OF THE VIEWS OF THE COURT OF CLAIMS

The Court of Claims has no jurisdiction of tax cases as such. The Court's jurisdiction arises under Section 145 of the Judicial Code, which authorizes a money judgment against the United States for an illegal exaction of money under a law of Congress. The Court has no power or authority over the *acts* of the Commissioner, can not control what he shall or shall not do, may not remand cases for action, either original or corrective. *Medbury* v. *United States*, 173 U. S. 492; *Newcomber* v. *United States*, 51 C. Cls. 408.

Every case heretofore involving jurisdiction of a claim arising under an Act of Congress under Section 145 of the Code clearly discloses authority of the officer to act and his erroneous application of

the facts to the statute authorizing the action. *Newcomber Case, supra.*

In revenue cases the *Rock Island case,* 254 U. S. 141, points out the necessary steps to be taken before our jurisdiction attaches. The revenue law imposes the taxes, the Commissioner assesses and levies the same. The Commissioner predicates his right to the exaction under a specified section of the law. With the facts before him he proceeds under that section of the law and makes the levy. The taxpayer contests the legality of his action, pays the tax, applies for a refund; a refund is refused. Undoubtedly under the applicable sections of the law, viz, Sections 3220–3226, R. S., this Court has jurisdiction, if not barred by limitations, to pass upon the case and either award a money judgment for the sum illegally exacted under the section of the revenue law under which the tax was levied or dismiss the petition. *Rock Island case, supra.*

If the plaintiff in this case was seeking a judgment under the facts above stated, the Court has jurisdiction to proceed to judgment. The plaintiff does not seek a judgment for $383,083.53, the amount of the tax levied and paid under Section 301 of the Revenue Act of 1918; nor does he assert that if that section is applicable the tax is illegally assessed. No claim is made for the whole or any portion of the tax paid under Section 301 if that section has been correctly applied by the Commissioner. If such a claim appeared in the allegation of the petition we have jurisdiction.

Plaintiff does not assert that he is not liable for income, excess-profits, and war taxes under the revenue law. The complaint is directed toward a failure of the Commissioner, as well as a refusal, to assess his taxes under Sections 327 and 328 of the Revenue Act of 1918. The Commissioner declined to assess the taxes involved under Sections 327 and 328, *supra;* therefore, under this petition there is before the Court the single issue, i. e., was the plaintiff liable for the taxes at issue under Section 301? If not, plaintiff is entitled to a judgment for $383,083.53, with interest thereon. Either that sum, or the petition be dismissed. The Court of Claims in so holding might affirmatively say that Sections 327 and 328 were the sections of the law under which the levy should have been made; but it is assuredly without power to force the Commissioner to proceed under those sections or to ascertain the amount of the tax due thereunder.

The vital distinction lies in the fact that the plaintiff is not asking the Court to do any of the things set forth above. What the petition asks the Court to do is to first find that under Section 301 the taxes were illegally exacted; that they should have been levied under Sections 327 and 328. The Court must then find what the amount of the tax would be under Sections 327 and 328 and award judgment for the plaintiff. In other words, the Court's opinion is sought as to whether the plaintiff's liability for taxes is to be increased or diminished—

not upon what the Commissioner has done, but upon what he refuses to do.

Sections 327 and 328 provide what the Commissioner shall do in making special assessments, i. e., aside from his discretionary authority to apply the law.

1. "The amount of the tax shall be the amount which bears the same ratio to the net income of the taxpayer * * * for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income * * * for such year."

2. The Commissioner in making the comparison is limited to representative corporations whose invested capital can be satisfactorily determined under Section 326, and whose gross income, net income, profits per unit of business transacted, etc., are similar from point of situation.

If the jurisdiction of the Court of Claims extends to the adjudication of the issue presented in this case and the Court should determine that the plaintiff was illegally assessed under Section 301, and Sections 327 and 328 are applicable, it then becomes the duty of the Court to ascertain the amount of the tax due under special assessment so that one may be set off against the other. That is precisely what the Court is asked to do.

By what process may this be done? The Commissioner has not made a record of facts for which the Court may issue a call under Section 164 of the Judicial Code. The Commissioner refused to

do so. The record of proceedings in the Commissioner's office is not in dispute. The facts upon which he acted are available. Therefore, the only remaining resource of the Court, if special assessment is to obtain, is to issue a call for the returns made by such representative corporations as set forth in No. 2 above. The Court has authority to issue the call; but under the same section which confers the authority is the reserved right of the head of any department to refuse compliance therewith "when, in his opinion, such compliance would be injurious to the public interest." If the head of the Department refuses, the Court is without authority to enforce compliance.

Section 257 of the Revenue Act manifestly furnishes a substantial cause for refusal.

If it should be urged that under the *Oesterlein Case* the Court may issue a subpœna *duces tecum* for the papers, the reply is that this would be the equivalent of nullifying the reservation in Section 164 of the Code and enable the Court to do indirectly what it may not do directly. If the Court may do this in a tax case, it may be done in every case of refusal, and thereby defeat the evident purpose of the reservation.

Granting, *arguendo*, the authority of the Court to obtain the files of the Commissioner with respect to representative corporations, what follows? The Court is then put in the situation where the law places the Commissioner, and instead of ascertaining whether the Commissioner has or has not cor-

rectly applied existing facts to a law of Congress, the Court, as an original proposition, assesses the tax, ascertains the difference, and renders a judgment in accord with its opinion. In other words, the Court assesses and levies the tax. The Court's jurisdiction in tax cases was stated in *United States* v. *Emery*, 237 U. S. 28. This case, followed by the *Rock Island Case*, 254 U. S. 141, points out the preliminary steps to be taken by a taxpayer before he may sue in this Court.

Obviously the preliminary proceedings as to Sections 327 and 328 have not been observed. The plaintiff has mistaken his forum, the Board of Tax Appeals, and the right of review accorded in the Act creating the Board.

The Court of Claims suggests that it may not remand the case to the Bureau of Internal Revenue or direct the Commissioner of Internal Revenue what he shall do, and believing that it may not for itself determine the true tax through the application of the special assessment provisions, it concludes that it has no jurisdiction. It is clearly right in holding that it may not remand cases to the Bureau of Internal Revenue for further action nor direct the Commissioner what action to take, but under the decision in the *Oesterlein Machine Company case* we do not see how it can be said that determining the true tax under the special assessment provisions is not a judicial function or constitutes the administrative act of making an assess-

ment. In all tax cases where judgment for amounts erroneously or illegally assessed are awarded, the Court of Claims necessarily determines for itself, through the application of the proper provisions of the Revenue Acts to the facts before it, what the correct tax should have been. The court below also suggests that its functions are limited to awarding recovery for taxes illegally assessed where the proper section was applied by the Commissioner but given a wrong application to the facts, and it is suggested that where, as in this case, the Commissioner has applied one section prescribing the general method of computing taxes when he should have applied another section of the same statute, the Court of Claims is without jurisdiction to determine whether the tax paid was illegally or erroneously assessed or collected and, if so, in what amount. We can not see that its jurisdiction to determine the amount and award judgment for taxes erroneously or illegally assessed or collected is limited to those cases where the Commissioner applies the right section but does it in an improper way. This argument of the Court of Claims may lead to the conclusion that in those cases in which the Commissioner has refused to apply special assessment sections, the Court of Claims is without jurisdiction, but in those cases in which he has applied the special assessment sections, but done so improperly, it may then review his action and determine what the true tax should have been. The *Oesterlein Machine Company case* dealt with both

of these situations and made no distinction between them.

Whether the tax was erroneously or illegally assessed or collected is to be determined by the application of any and all applicable sections of the revenue laws.

We appreciate the difficulties confronting the Court of Claims in the disposition of these cases as the result of the decision in the *Oesterlein case*. A perfect avalanche of claims arising under these special assessments has started in the Bureau of Internal Revenue and in the courts. The taxpayer, not having definite information as to returns made and taxes paid by other representative corporations in the same line of business, brings a suit in the nature of a fishing expedition, alleging, as in this case, that he was entitled to special assessment because of abnormal conditions affecting his business, resulting in hardship by comparison with other taxpayers in the same line of business, and he makes a guess at the amount which he would have saved if special assessment had been applied. This states a cause of action, and he then applies to the Court of Claims to have the returns of all corporations engaged in the same line of business brought into court for examination and comparison. As the formula prescribed by Sections 327 and 328 is not definite and exact, the cases are involved and require much time in their trial. For these reasons the Court of Claims no doubt searches for some substantial legal ground on which it may be relieved of

this task, and if its views are sound, or this Court can find any ground for distinguishing the case in principle from the *Oesterlein case*, the Bureau of Internal Revenue and the Court of Claims division of the Department of Justice will be pleased.

As yet we have been unable to devise any theory on which the reopening of these special assessment cases in the courts may be avoided, short of a reconsideration of the conclusions reached in *Blair, Commissioner*, v. *Oesterlein Machine Company*.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

APRIL, 1928.

Office Supreme Court, U. S.
FILED
APR 24 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 337.

THE WILLIAMSPORT WIRE ROPE COMPANY,
Appellant,

vs.

THE UNITED STATES,
Respondent.

BRIEF SUBMITTED WITH THE CONSENT OF THE COURT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 337.

THE WILLIAMSPORT WIRE ROPE COMPANY,
Appellant,

vs.

THE UNITED STATES,
Respondent.

Appeal From the Court of Claims.

BRIEF SUBMITTED WITH THE CONSENT OF THE COURT BY ADRIAN C. HUMPHREYS AND NEWTON K. FOX, AMICI CURIAE.

This case is one of unusual importance since it involves primarily the question of the jurisdiction of the Federal courts to review the action of the Commis-

sioner of Internal Revenue in cases of "special assessment" arising under Sections 327 and 328 of the Revenue Act of 1918.

The jurisdiction of the Court of Claims in cases arising under the internal revenue laws is provided by Section 145 of the Judicial Code, Paragraph First, as follows:

> "All claims * * * founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department * * *."

The district courts of the United States have concurrent jurisdiction with the Court of Claims under Section 24, paragraph twentieth, as follows:

> "Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States, or any law of Congress, or upon any regulation of an Executive Department * * *."

The general jurisdiction of the United States District Courts is provided by Section 24, paragraph fifth of the Judicial Code as follows:

> "Of all cases arising under any law providing for internal revenue, or for revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals." (36 Stat. L. 1092)

This court sustained the jurisdiction of the United States District Court, sitting as a Court of Claims, in a suit arising under the internal revenue laws in the

case of *United States v. Emery Bird Thayer Realty Company* (237 U. S. 28) on the ground that the claim was "founded upon" a law of Congress.

The above statutes conferring upon the Federal Courts jurisdiction in revenue cases is couched in the broadest language. Section 24, paragraph fifth, confers jurisdiction in "*all cases.*" Section 24, paragraph twentieth and Section 145 confer jurisdiction of "*all claims.*" Since the language is specific, there is no warrant for a construction which would interpret that language as meaning "some" revenue cases.

A suit to recover taxes arising under Sections 327 and 328 of the Revenue Act of 1918 is no different from any other suit to recover taxes illegally assessed and collected. The gravamen of the complaint lies in the erroneous and illegal assessment by the Commissioner of Internal Revenue of excess profits taxes under the provisions of Section 301 of the Revenue Act of 1918 instead of Section 328 by reason of which the plaintiff has paid more tax than was legally due.

Sections 327 and 328 of the Revenue Act of 1918 are relief provisions designed to alleviate the hardship in certain cases where assessment under Section 301 would result in discrimination and inequality.

When Congress passed the Revenue Act of 1918 it recognized that the harsh provisions of the War Profits and Excess Profits Tax would result in discrimination unless some exceptions were made. Congress knew that many corporations were under-capitalized due to a continued conservative practice and policy of charging capital expenditures to expense, or of writing down the value of tangible assets through excessive charges for depreciation, or carrying tangible and intangible assets at a book value or nominal cost which did not

represent the actual value. Also prior to the Excess Profits Tax a mixed aggregate of tangible and intangible assets had in many cases been paid into a corporation in exchange for its capital stock.

Congress further recognized that in many cases abnormal conditions would affect the income or capital of a corporation. Congress also realized that it would be manifestly unjust to penalize a conservative company by the harsh provisions of the Excess Profits Tax while a competitor which had either kept complete and accurate accounting records or had overvalued its assets would pay a much lower tax. Congress recognized the difficulty of examining books and records of foreign corporations and determining their invested capital.

Congress, therefore, provided that in the cases enumerated in Section 327 of the Revenue Act of 1918 the Commissioner should compute the Excess Profits Tax by a comparison with representative corporations engaged in a like or similar trade or business. The particular cases specified are as follows:

> "That in the following cases the tax shall be determined as provided in Section 328:
>
> (a) Where the Commissioner is unable to determine the invested capital as provided in Section 326;
>
> (b) In the case of a foreign corporation;
>
> (c) Where a mixed aggregate of tangible and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in Section 328."

The above provisions are just as mandatory upon the Commissioner of Internal Revenue as any of the other provisions of the Revenue Act relating to the computation and assessment of taxes. It should be noted that Section 327 provides "That in the following cases the tax shall be determined as provided in Section 328." The word "shall" is mandatory, not permissive.

Where the conditions specified in Section 327 exist, the Commissioner *must* compute the Excess Profits tax in accordance with the provisions of Section 328. If he refuses, contrary to the actual facts, to recognize that the conditions specified in Section 327 do exist, then his action is subject to review by the Federal courts.

That the question is not one of discretion reposed in the Commissioner is clearly shown by paragraph (b) of Section 327 which provides that the tax of every foreign corporation shall be computed under Section 328. Let us assume that in the case of a foreign corporation the Commissioner should compute the tax under Section 301. Would the Federal courts be powerless to correct the error of the Commissioner and require him to compute the tax under Section 328 as provided by statute?

Whether a taxpayer is entitled to special assessment under Section 328 is in last analysis only a question of fact. If the facts of the particular case bring the taxpayer within the provisions of any subdivision of Section 327, then the Commissioner must compute the tax under the provisions of Section 328. There is no discretion.

Whether a taxpayer comes within the provisions of Section 327 is just as much a question of fact as the determination of a March 1, 1913, value for the purpose of computing a gain or loss upon the sale of capital assets or the finding that a gift made within two years prior to the death of a decedent was a gift made in contemplation of death and therefore taxable as part of the gross estate. Both of these determinations by the Commissioner are subject to judicial review. In assessing taxes, the Commissioner must follow the mandatory provisions of the statute as prescribed by Congress and if he errs in the determination of a question of fact, Congress has provided in the broadest possible language that relief may be had in the Federal courts by a suit to recover the amount of taxes overpaid.

The jurisdiction of the United States Board of Tax Appeals to review the action of the Commissioner of Internal Revenue in special assessment cases arising under the provisions of Sections 327 and 328 of the Revenue Act of 1918 was recently sustained by this Court in the case of *Blair v. Oesterlein Machine Company* (48 Sup. Ct. 87). The jurisdiction of the Board of Tax Appeals is no greater than that of the Federal courts, as a matter of fact, it is more restricted.

The Court of Claims in the case at bar held that it had no jurisdiction of special assessment cases. If

this decision is sound there is no jurisdiction in any Federal court. This decision creates an anomalous situation and confers upon the Board of Tax Appeals an exclusive jurisdiction to review the action of the Commissioner in special assessment cases. Special assessment only affects taxes for the years 1917 to 1920 inclusive. The Board of Tax Appeals was not organized until June, 1924. Prior to June, 1924, the majority of special assessment cases had already been decided by the Commission of Internal Revenue and the taxpayer's only remedy was a suit in court. Under these conditions the diligent taxpayer who promptly filed his application for special assessment and had his application denied by the Commissioner prior to June, 1924, would be without a right of review or remedy. On the other hand the less diligent taxpayer who by one method or another had delayed consideration of his case until after June, 1924, would be entitled to a review of the action of the Commissioner before the Board of Tax Appeals. Certainly, jurisdiction of the courts and the right to a judicial review cannot thus depend on chance.

A great number of cases are now pending in the Federal courts seeking a review of the action of the Commissioner of Internal Revenue in special assessment cases. They arise under the various subdivisions of Section 327 of the Revenue Act of 1918.

There are cases under subdivision (a) where it is impossible to determine the invested capital under Section 326. Under this subdivision are cases where books and records have been lost or destroyed and cases where there is a wide divergence between the amount of invested capital claimed by the taxpayer and the amount allowed by the Commissioner under Section 301.

Foreign corporations assessed under subdivision (b) may be dissatisfied with the Commissioner's use of comparative concerns and computation of tax; it is certainly entitled to its day in court.

There are cases under subdivision (c) where a mixed aggregate of tangible and intangible property has been paid in for stock and bonds and the respective values of the property paid in can not be determined. Under this subdivision are cases involving the consolidations and mergers of corporations beginning about the year 1898 where assets of the merging companies were transferred in exchange for stock in the newly organized parent company.

There are a great many cases arising under subdivision (d) where various "abnormal conditions" too numerous to detail here, affect the capital or income of a corporation.

The existence of an abnormality and a resulting hardship in the rate of tax can only be determined by a review of the full record in the case.

In the case of foreign corporations the selection of proper comparatives presents a serious question. The Commissioner compiles his "representative concerns" from the simple caption on each taxpayer's income tax return; this may or may not reflect the true character of its business. Therefore, every taxpayer qualifying for assessment under Sections 327 and 328 is entitled to show what corporations are "representative corporations engaged in the same or similar business."

The Commissioner is as apt to err in the determination of facts necessary to the operation of Sections 327 and 328 as in the determinations of a March 1, 1913, value or any other fact necessary to be found in

any other type of case, and the taxpayer is, or should be, equally entitled to a judicial review of his findings.

The cases pending in the Federal courts fall into three general groups: (1) Where the Commissioner has denied that the corporation comes within the provisions of Section 327 and the taxpayer contends that it does; (2) where the Commissioner has admitted that the corporation is within the provisions of Section 327 and has made a comparison with alleged representative corporations under Section 328 but denies that such comparison results in exceptional hardship because the tax paid was not proportionately larger than that paid by corporations engaged in the same or a similar business; (3) where the Commissioner has made a comparison under Section 328 with alleged representative corporations but the taxpayer contends that improper comparatives were used and that the use of proper comparatives would result in a lower tax.

In the case at bar the Court of Claims held that Section 327 conferred upon the Commissioner of Internal Revenue discretionary powers not subject to review by the Court. Depending upon the facts of the particular case, the application of Sections 327 and 328 are as definite and certain as a computation under Section 301 which is admittedly subject to review by the courts. If the decision of the Court of Claims is affirmed the forum of the Federal courts is open in *all* revenue cases *except* special assessment cases, while the forum of the Board of Tax Appeals would be open in *all* cases. Such an interpretation of the revenue laws would result in gross discrimination and would confer upon the Commissioner of Internal Revenue an unreviewable authority and discretion never con-

templated by Congress in passing the Revenue Act of 1918 and particularly Sections 327 and 328. The taxpayer has always had a right to sue in the Federal courts for the recovery of taxes overpaid. To deny the jurisdiction of the Federal courts in special assessment cases is to deprive the taxpayer of his day in court.

Respectfully submitted,

ADRIAN C. HUMPHREYS,
NEWTON K. FOX,

SUPREME COURT OF THE UNITED STATES.

No. 337.—October Term, 1927.

The Williamsport Wire Rope Co., Petitioner, vs. The United States.	On Writ of Certiorari to the Court of Claims.

[June 4, 1928.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Williamsport Wire Rope Company brought this action in the Court of Claims, on December 19, 1924, to recover the amount of an alleged overpayment of excess profits and war profits taxes for the calendar year 1918, laid under the Revenue Act of February 24, 1919, c. 18, 40 Stat. 1057. The petition alleged the following facts: The Company had conceded in its return, and had paid, a total tax of $306,381.77, for the year 1918. In April, 1920, the Commissioner of Internal Revenue levied upon it an additional assessment of $89,094.85, which the Company paid under protest. On June 10, 1924, a portion of the sum so paid was refunded. Four days later, the Company filed a claim for a further refund of $100,000. The claim alleged that for reasons there set forth, which are repeated in the petition, the Company was entitled, under sub-divisions (a) and (d) of § 327 of the Revenue Act of 1918, to have a special assessment made under § 328 of that Act.[1] The

[1] Sec. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section

Commissioner having failed to make the refund within six months after demand, this suit was brought. The Government demurred to the petition on the ground that the Court of Claims was without jurisdiction to grant the relief sought, and the demurrer was sustained. 63 Ct. Cls. 463. The case is here on certiorari. 275 U. S. —.

In its petition for a writ of certiorari, the Williamsport Company alleged that its rights would presumably be determined by the decision in *Blair* v. *Oesterlein Machine Co.*, a case then pending in this Court; and the Solicitor General, being of the same opinion, did not feel justified in opposing the granting of the writ. Decision on the petition was postponed pending decision of the *Oesterlein* case. That case, 275 U. S. 220, was decided November 21, 1927.

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would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328.

Sec. 328 (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

We there held that the exercise of the judgment or discretion of the Commissioner to allow or deny the special assessment provided for in §§ 327 and 328 was subject to review by the Board of Tax Appeals; and that therefore the taxpayer was entitled to an order compelling the Commissioner to respond to the subpoena of the Board issued under § 900(1) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 338, requiring him to answer interrogatories and to furnish information contained in the returns of other corporations. On November 28, the writ of certiorari in this case was granted. Thereupon, the Williamsport Company moved, presumably in analogy to motions to affirm under Rule 6, that the judgment against it be reversed on the authority of the *Oesterlein* case. The Solicitor General, while not opposing the motion, advised us that the Court of Claims had, since the decision of the *Oesterlein* case, adhered to the view that it was without power to determine whether the Commissioner of Internal Revenue had erred in refusing to make a special assessment under §§ 327 and 328. We then assigned the case for oral argument, without passing on the motion to reverse and remand.

The contention here is that, since the Commissioner's action was made reviewable on appeal by the Board of Tax Appeals, it is and was always reviewable in an original proceeding before the Court of Claims. The argument is that Congress has conferred upon the Court of Claims jurisdiction over suits to recover taxes alleged to have been "erroneously or illegally assessed or collected;"[2] that here its jurisdiction is invoked to recover taxes claimed to have been assessed illegally, because assessed under § 301 instead of under §§ 327 and 328; that it must therefore have power to determine whether conditions existed which entitled the Company to the special assessment provided for by §§ 327 and 328; that if it finds that such conditions did exist, it must also have power to determine the true amount of the tax computed as therein directed; and that if it appears that the tax actually paid exceeds that which would have been exacted under the special assessment, the Court may award judgment for the difference.

[2]Recent statutes have used this phrase in describing the jurisdiction of the Court of Claims and the District Courts over suits by taxpayers to recover taxes. See Revenue Act of 1921, c. 136, §§ 1310(c), 1324(b), 42 Stat. 227, 311, 316; Revenue Act of 1924, c. 234, § 1020, 43 Stat. 253, 346. Compare Revenue Act of 1926, c. 27, §§ 284, 1111, 44 Stat. 9, 66, 114.

Sections 327 and 328 were intended to broaden the powers of relief first conferred by § 210 of the War Revenue Act of 1917, c. 63, 40 Stat. 300, 307.[3] It was "believed necessary to provide a special method of determining the tax for those cases in which the ordinary method of assessment would result in grave hardship or serious inequality." Senate Report, 65th Cong. 3d Sess., No. 617, p. 14. The special assessment is to be made under paragraph (a) when the Commissioner "is unable to determine the invested capital." It is to be made under paragraph (d) if he "finds and so declares of record that the tax if determined without the benefit of this section would . . . work . . . an exceptional hardship . . . ." The task imposed on the Commissioner by §§ 327 and 328 was one that could only be performed by an official or a body having wide knowledge and experience with the class of problems concerned. For the requirement of a special assessment under paragraph (d) of § 327 and its computation in all cases, are dependent on "the average tax of representative corporations engaged in a like or similar trade or business."[4]

To perform that task, power discretionary in character was necessarily conferred.[5] Whether, as provided in paragraph (d) of § 327, there are "abnormal conditions," whether, because of those conditions, computation under § 301 would work "exceptional hardship," whether there would be "gross disproportion" between the tax computed under § 301 and "that computed by reference to the

[3]Section 210 was literally construed by the Treasury. See Regulations 41, art. 52 (T. D. 2694).

[4]At the time of passing the 1918 act Congress had before it the Report of the Commissioner of Internal Revenue for 1918. The Commissioner said of the administration of § 210 of the Act of 1917: "Returns filed under section 210 presented even more difficult problems as to the amount of invested capital that could properly be set up as being equivalent to the invested capital of representative concerns engaged in 'a like or similar trade or business.' Consequently, it was necessary for the Bureau to assemble, as promptly as possible, returns filed under these sections of the law and analyze them in the light of the facts disclosed by normal returns. Thousands of cases were examined in detail and subjected to comprehensive statistical studies to determine normal percentages of income to invested capital in different lines of business under varying conditions and circumstances in order that a basis of procedure might be defined for treatment of cases under sections 209 and 210." P. 17.

[5]See House Report, 65th Cong., 2d Sess., No. 767, p. 19; Senate Report, 65th Cong., 3d Sess., No. 617, p. 14; remarks of Mr. Kitchin presenting the conference report to the House, 57 Cong. Rec. 3098; remarks of Mr. Simmons presenting the conference report to the Senate, 57 Cong. Rec. 3134-3135.

representative corporations specified in section 328;" what are "representative corporations engaged in a like or similar trade or business"; which corporations are "as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances"—these are all questions of administrative discretion.

The soundness of the judgment exercised by the individual or body to whom the task was confided would depend largely upon the extent both of the knowledge of the special subject possessed and of the experience had in dealing with this particular class of problems. The conclusions reached would rest largely upon considerations not entirely susceptible of proof or disproof. Congress did not, by the Revenue Act of 1918, require the Commissioner to embody the results of his deliberation in findings of fact. The purpose of the meagre record prescribed by § 328 (c) in case the Commissioner concludes to order a special assessment is apparently to protect the Treasury, not the taxpayer.* For if the Commissioner refuses to make the special assessment, he is not required to state the grounds of his refusal, or, indeed, even to record the fact of such refusal. Thus the aims which induced Congress to enact §§ 327 and 328, the nature of the task which it confided to the Commissioner, the methods of procedure prescribed, and the language employed to express the conditions under which the special assessment is required, all negative the right to a review of his determination by a court.

It is true that where the Commissioner's action is reviewable judicially, his findings of fact in making an assessment, as distinguished from his determinations involving administrative discretion, constitute only prima facie evidence; and that, in cases arising under the internal revenue laws, such findings are commonly reviewable by courts in appropriate proceedings in which the facts become an issue. *United States* v. *Rindskopf*, 105 U. S. 418, 422; *Wickwire* v. *Reinecke*, 275 U. S. 101, 105. It is also true that in reviewing the

*The Report of the Select Committee of the Senate on Investigation of the Bureau of Internal Revenue, Senate Report, 69th Cong., 1st Sess., No. 27, Pt. I, p. 221, contains a list of all refunds, credits and abatements exceeding $250,000 made through special assessments under § 210 of the Act of 1917 and § 328 of the Act of 1918. Compare Pt. II, pp. 2736ff.

Commissioner's findings on such matters as value, compare *Castner, Curran & Bullitt, Inc.* v. *Lederer*, 275 Fed. 221; *Little Cahaba Coal Co.* v. *United States*, 15 F. (2d) 863; allowances for depreciation, compare *Cohen* v. *Lowe*, 234 Fed. 474; *Camp Bird, Ltd.* v. *Howbert*, 262 Fed. 114; or the accuracy with which a taxpayer's books reflect his income, compare *In re Sh[illegible]man*, 14 F. (2d) 323, courts may be confronted with problems requiring a high degree of technical knowledge for their solution. But such problems involve primarily the situation of a single taxpayer, and the controlling data can easily be made available to the court. Here, the considerations which demand special assessment under § 327 (d), and those which govern its computation in all cases, are facts concerning the situation of a large group of taxpayers which can only be known to an official or a body having wide experience in such matters and ready access to the means of information.

The jurisdiction of the Court of Claims, if any, rests on statutory provisions which long antedate the Revenue Act of 1918. Its jurisdiction over suits to recover taxes is based on the clause in the original Act of February 24, 1855, c. 122, 10 Stat. 612, empowering it to determine "all claims founded upon any law of Congress." *United States* v. *Kaufman*, 96 U. S. 567, 569; *Dooley* v. *United States*, 182 U. S. 222. Compare *United States* v. *Emery, Bird, Thayer Co.*, 237 U. S. 28. But we have held that the Court of Claims is without jurisdiction where the statute creating the claim expressly refers it for final determination to an executive department. *United States* v. *Babcock*, 250 U. S. 328, 331. And that it is equally without jurisdiction where from an examination of all the terms of the statute it appears that Congress intended to vest final authority in an administrative agency. *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 249 U. S. 451; *Silberschein* v. *United States*, 266 U. S. 221. Long ago Congress conferred final authority upon such an agency in the enforcement of the appraisal provisions by which the amounts payable under the customs laws are determined. Compare *Bartlett* v. *Kane*, 16 How. 263, 272; *Hilton* v. *Merritt*, 110 U. S. 97, 105; *Passavant* v. *United States*, 148 U. S. 214.

Moreover, whatever jurisdiction is possessed by the Court of Claims to review determinations under §§ 327 and 328, would be possessed also by the district courts in suits against collectors and in actions against the United States, under § 24 (20) of the Judi-

cial Code. Thus the determinations of the Commissioner in this delicate and complex phase of revenue administration would be subjected to review by a large number of courts, none of which have ready access to the information necessary to enable them to arrive at a proper conclusion in revising his decisions; whose experience in passing upon questions of this character would be limited; and whose varying decisions would tend to defeat, rather than promote, that equality in the application of the revenue law which §§ 327 and 328 were designed to ensure. We conclude that the determination whether the taxpayer is entitled to the special assessment was confided by Congress to the Commissioner, and could not, under the Revenue Act of 1918, be challenged in the courts—at least in the absence of fraud or other irregularities.

It remains to consider whether jurisdiction to review the Commissioner's action was conferred upon the Court of Claims as a result of the Revenue Act of June 2, 1924, c. 234, 43 Stat. 253, 336, which created the Board of Tax Appeals. There is nothing in that Act which purports to enlarge the jurisdiction of the Court of Claims or to extend the scope of judicial review over determinations of the Commissioner. The contention that it had this effect rests wholly on our decision in *Blair* v. *Oesterlein Machine Co.*, 275 U. S. 220. The contention fails to take account of the important differences between an appeal to the Board of Tax Appeals, on the one hand, and an original suit in the Court of Claims, or in a district court, on the other. The Board of Tax Appeals was created to perform the administrative functions theretofore discharged by the Committee on Appeals and Review, which the Commissioner of Internal Revenue had established in his office.[1] See House Report, 68th Cong. 1st Sess., No. 179, p. 7; Senate Report, 68th Cong. 1st Sess., No. 398, p. 8. The Committee had regularly re-

[1]The Revenue Act of 1918, c. 18, § 1301 (d), 40 Stat. 1057, 1141, created an Advisory Tax Board to be appointed by the Commissioner with the approval of the Secretary of the Treasury. See House Report, 65th Cong., 2d Sess., No. 767, p. 38; Senate Report, 65th Cong., 3d Sess., No. 617, p. 58. The Commissioner might submit to the Board and on the request of a taxpayer must submit any question relating to the interpretation or administration of the income, war profits or excess profits tax. The functions of the Board were, in some degree, similar to those of the excess profits tax advisers and reviewers who had aided the Commissioner in applying the 1917 act. See Report of the Commissioner of Internal Revenue, 1918, p. 13. Procedure as to the submission of questions and practice before the Board was established by Regulations 45,

viewed determinations granting or denying special assessment under §§ 327 and 328.* The granting of these powers of review to the Board of Tax Appeals did not change the character of the appeal. And it affords no reason to conclude that Congress intended that the Court of Claims and the district courts should also be authorized to reexamine the decisions of the Commissioner on questions of the character here involved.

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art. 1701 (T. D. 2831). The Board, which was organized on March 13, 1919, came to an end on October 1 of that year. Report, 1919, pp. 12-14.

The work that had been performed by the Advisory Tax Board was, however, immediately taken over by a committee of lawyers and accountants organized by the Commissioner in the Bureau. Report, 1919, p. 14. The procedure for taking appeals to this committee, which was known as the Committee on Appeals and Review, was laid down in O. D. 709, 3 C. B. 370. The nature of the work of this body is described in the Commissioner's Report for 1920, pp. 14-15, and for 1921, pp. 14-15.

Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 267-268, provided that if on examination of a return under the Acts of 1916, 1917, 1918, or 1921, a tax or deficiency in tax should be discovered, the taxpayer should be notified and given a period of not less than 30 days in which to file an appeal. See House Report, 67th Cong., 1st Sess., No. 350, p. 14; Senate Report, 67th Cong., 1st Sess., No. 275, pp. 20-21. The procedure for perfecting appeals under this section was laid down by T. D. 3269; Regulations 62, art. 1006 (T. D. 3409); and T. D. 3492. Appeals under this section appear to have been commonly handled by the Committee on Appeals and Review. See Rules of Procedure before the Committee, A. R. M. 219, Int. Rev. Cum. Bull. III-1, 319. Reports of the Commissioner for 1922, p. 15, for 1923, pp. 8-9, and for 1924, pp. 10-12.

The Board of Tax Appeals was created by § 900 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 336. Section 1100 of the same act, 43 Stat. 253, 352, repealed § 250 of the Revenue Act of 1921. By T. D. 3616 (July 16, 1924), all cases pending before the Committee and the Special Committee on Appeals and Review were transferred to the Solicitor of Internal Revenue, and the Committees were abolished. See also Report of the Commissioner for 1924, p. 12.

*In the following cases the Advisory Tax Board or the Committee on Appeals and Review considered the question whether, under § 210 of the 1917 act or § 327 of the 1918 act, a special assessment ought to be made: T. B. M. 53, 1 C. B. 303; T. B. M. 58, 1 C. B. 304; A. R. R. 36, 2 C. B. 269; A. R. R. 70, 2 C. B. 287; A. R. M. 12, 2 C. B. 292; A. R. R. 19, 2 C. B. 298; A. R. R. 104, 2 C. B. 301; A. R. R. 110, 2 C. B. 303; A. R. R. 209, 3 C. B. 360; A. R. R. 332, 3 C. B. 362; A. R. R. 338, 3 C. B. 363; A. R. R. 363, 4 C. B. 14; A. R. R. 364, 4 C. B. 16; A. R. R. 464, 4 C. B. 17; A. R. R. 459, 4 C. B. 399; A. R. R. 518, 4 C. B. 401; A. R. R. 556, 5 C. B. 142; A. R. R. 538, 5 C. B. 301; A. R. R. 599, 5 C. B. 304.

It is true that, unlike the Committee, the Board of Tax Appeals is not a part of the Bureau of Internal Revenue. The Board is an independent agency. But by specific provision of the Revenue Act of 1924, c. 234, § 900(k), 43 Stat. 253, 338, it was defined as an agency "in the executive branch of the Government." Compare *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 121-122. Its sole function consists in reviewing, on appeal, determinations of the Commissioner under the revenue laws. The fact that the Commissioner is a party to all cases before it enables the Board, by rules of procedure which it has developed, to leave to the Commissioner the initial determination of many questions requiring the use of facts not in the record.[9] Its limited, specialized functions enable its members to acquire the extensive special knowledge and the specific experience essential to a sound exercise of judgment in dealing with questions arising under §§ 327 and 328.[10] As was said in the *Oesterlein* case, *supra*, at p. 226, there is no reason for thinking that Congress considered the Commissioner to be better qualified for making determinations under §§ 327 and 328 than this administrative agency specially established to review his decisions.

Affirmed.

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[9]Rule 62, effective December 28, 1927, lays down the procedure in special assessment cases. By paragraph (b) it is provided that the hearing may, in the discretion of the Board, on motion, be limited to the question whether the petitioner is entitled to have its tax determined under § 328 (or § 210). Paragraph (c) provides that if the Board decides that the petitioner is so entitled, the Commissioner shall file within 60 days after such decision, a proposed redetermination showing the basis and method of the computation. If, within 20 days after service by the Board upon the petitioner of a copy of such proposed redetermination, the parties are unable to agree on the amount of the tax, either party may move or the Board on its own motion may order that the case be placed on the calendar for further hearing. See also Rule 50, Settlement of Final Determination, as amended April 28, 1928.

[10]The administration of the special assessment sections by the Commissioner was being investigated by a Select Committee of the Senate at the very time when Congress had the Revenue Bill of 1924 under consideration. See Hearings *before* the Select Committee on Investigation of the Bureau of Internal Revenue, U. S. Senate, 68th Cong., 1st Sess., pursuant to S. Res. 168, p. 136. Compare the final report of the committee, Senate Report, 69th Cong., 1st Sess., No. 27, Pt. I, pp. 6, 214-223, Pt. II, pp. 247, 280. Congress plainly did not intend to remove altogether the right to a review of determinations under § 327 which, by virtue of § 1301(d) of the Act of 1918, § 250(d) of the Act of 1921, and the regulations of the Bureau, the taxpayer had theretofore enjoyed.